IN THE MATTER OF A COMPLAINT BASED ON THE ONTARIO HUMAN RIGHTS CODE , 1981, ch.53, AS AMENDED,

BETWEEN

Jan Waterman and the Ontario Human Rights Commission, Complainants

AND

The National Life Assurance Company of Canada. Ross Johnson and Vince Tonna, Respondents.

Date of Complaint: September 13, 1988

Dates of Hearing: July 10, Sept. 4, Oct. 5,8,9,13,14,16,20,21, Nov. 2, Dec. 15, all 1992.

Conclusion of Hearing Process (delivery of final transcript): January 14, 1993.

Place of Hearing: Toronto

Date of Decision: February 5 , 1993

Board of Inquiry: W. Gunther Plaut

Counsel: Catherine Bickley, for the Commission
Kathryn Chalmers, Bruce Pollock, Elizabeth Turner for National Life Assurance Company and Vince Tonna
Russell Juriansz, Margot Blight, for Ross Johnson

SUMMARY

On September 13, 1988 Ms. Jan Waterman filed a complaint against the above-named Respondents, alleging that she had been denied permanent employment by the National Life Assurance Company of Canada ("NLA") because of her sexual orientation, and also because she had refused to infringe the right of another person, in contravention of the Ontario Human Rights Code ("the *Code*"), sections 4(1), 7 and 8 (now numbered 5, 8 and 9, as they will be cited hereafter). She is seeking replacement of wages lost as well compensation for anguish, stress, and loss of dignity. Respondents in their turn reserve the right to ask that the Commission pay them compensatory damages in accordance with. s. 41(6) of the *Code*.

The complainant had worked for NLA for some time as a contract or temporary employee, and had not been awarded a permanent position. NLA asserts that a wage freeze was in effect at the time, due to the company having been sold, and that this was the cause for denying her a permanent position. She, on the other hand, believed that discrimination was at play and threatened to bring suit.

Subsequently Mr. Tonna (then a vice-president of NLA, Mr. Johnson being the president) did offer her, in writing, a permanent job. Ms. Waterman claims that Mr. Tonna, after making the offer, accompanied it with a verbal understanding (as Mr. Tonna calls it) or condition (as the Complainant calls it) that another employee of NLA and Ms.Waterman's intimate friend (whom at the hearings she called "her lover"), would have to be moved to another department. Ms. Waterman became very upset about this and subsequently made a counter-offer regarding herself and her friend. Mr. Tonna, however, decided that he had lost confidence in Ms. Waterman. He withdrew the job offer the following day, terminated her temporary employment and asked her to leave the company forthwith. Her friend's employment was not affected.

After some time Ms. Waterman began to look for new employment, engaged in a series of consulting and other enterprises and eventually found the permanent position which she holds today.

It is Ms. Waterman's and the Commission's claim that the earlier failure to engage the complainant was based on her sexual orientation, which was well known, and that the condition attached to the eventual job offer was discriminatory. These aspects of the

complaint are covered by s. 5(1), 8 and 9 of the *Code:*

> 5(1) Every person has a right to equal treatment with respect to employment without discrimination because of...sexual orientation.
>
> 8. Every person has the right to claim and enforce his or her rights under this Act and to refuse to infringe the right of another person under this Act, without reprisal or threat of reprisal for so doing.
>
> 9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

It is the claim of the Respondents that sexual orientation played no role whatsoever in their relationship with Ms. Waterman, that the company had a record of fair treatment in this regard, that the failure to engage her at an earlier time had other reasons, and that, when the final job offer was made, nothing but sound business judgement demanded that Ms. Waterman's friend would have to be moved.

The underlying basic facts were generally not contested. But there was sharp disagreement on whether certain statements were made or not made, and widely different interpretations of the reasons for various events were offered in the testimony of the principals as well as their witnesses.

No substantial facts are in dispute regarding Mr. Tonna, the crucial issue being one of his motivation which led him to dismiss the Complainant.

As in most cases of this kind, this Board had to deal with a fair amount of circumstantial evidence and the decision was based on a balance of probabilities.

PRELIMINARY ISSUES

At the initial teleconference on July 10, 1992, this Board was advised that certain preliminary issues would be raised: At the first hearings, on September 4, the following were introduced:

1. a request to give Respondents access to the personal notes of the investigation officer of the Commission;

2. a further request that the Commission provide particulars regarding documents and persons it intended to rely upon at the hearings, as well as the remedies

sought;

3. a request by the Commission to ban the publication of the name of one witness whom it wished to call.

I reserved on all three issues and subsequently issued rulings which are detailed below as Appendices. A number of other interim decisions are also appended, inasmuch a fair amount of time at these hearings was devoted to procedural matters.

SUMMARY OF INTERIM DECISIONS.

The case engendered an unusual number of interim decisions, which are appended to this decision.

Appendix A: Access to the officer's personal notes was denied (September 8).

Appendix B: The Commission was requested to submit certain particulars and, if it was unwilling to supply them, state the reasons therefor (September 8).

Appendix C: Respondents requested an opportunity to respond to the Commission's refusal to divulge certain particulars, if any. The request was granted (September 9).

Appendix D. Respondents requested further particulars. which request was communicated to the Commission. Respondents, being the ones bringing the motion. were asked to supply relevant jurisprudence (September 17).

Appendix E: Procedural rulings regarding particulars and potential witnesses (September 25).

Appendix F: A request that certain witnesses not be called was denied, but Respondents were assured of the opportunity to have their interests fully protected (October 5).

Appendix G: Objections were raised concerning the late introduction of certain witnesses. Because one of these had to be heard at once, the Complainant's testimony had to be interrupted and a request was entered to have her excluded during the scheduled testimony of that witness. The Commission consenting, I allowed the request (October 8).

Appendix H: The Commission also requested permission -- admittedly very late -- to call its investigating officer. The Respondents objected. I ruled that the officer could be called only if special circumstances would so demand. (October 9)

Appendix I: Respondents requested that testimony by Stuart Kent involving conversations with Joe Thomas (deceased) be prohibited as hearsay, and that a similar ruling be made regarding Mr. Kent's proposed references to conversations with Shirley Walker (presently unavailable for cross-examination). I agreed initially to the first request, rejecting the latter. But upon studying the relevant case law I amended my ruling and admitted testimony regarding conversations with the deceased (October 13/14).

Appendix J: Further procedural rulings:

1. On a matter of client/counsel privilege.

2. On banning the publication of a witness's name, on which I reserved my ruling (October 16).

Appendix K: Banning the publication of the witness's name (October 20).

Appendix L: Testimony of the investigating officer was admitted, but on a restricted basis only (November 2).

ISSUES TO BE DECIDED.

The following issues must therefore be addressed by this Board:

A. Was the earlier delay in affording Ms. Waterman a permanent appointment in any way connected to the fact that she was a homosexual, and openly so?

B. Was her discharge from NLA tainted by the same reason and was it, in addition, an act of reprisal?

The Complainant and the Commission aver that the answer to these questions is Yes, and the Respondents, that the answer is No. Both sides claim that their witnesses are more credible than their opponents'.

A. The delay in employing Ms. Waterman permanently.

1. Legal perspectives.

It is of course not illegal to refuse employment to anyone, as long as this refusal is not based on illegal grounds. But since the decision to employ or not to employ

Ms. Waterman was based on the decisor's motivation and reasoning it falls to the Board to make assumptions of what was in the mind of the person failing to make the contended decision.

Burden of proof. It is important to establish from the beginning on whom the burden of proof rests. If the Commission made a *prima facie* case of discrimination, the burden rests on the Respondents; if it does not, it remains with the Commission. A *prima facie* case is "one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer". See *O'Malley v. Simpsons-Sears* (1985), C.H.RR. D/103 (S.C.C.), at D/3018, ¶24782.

This means that respondents must offer an explanation for the contended action rested on non-discriminatory considerations. But it is up to the complainant to show, on the balance of probabilities, that the respondent's explanations are not to be believed. See e.g. *Almeida v. Chubb Fire Security Division of Chubb Industries Ltd.* (1984), 5 C.H.RR. D/2104, at 2105-06. Beatrice Vizkelety, *Proving Discrimination in Canada* (Toronto: Carswell, 1987), pp. 127 f.

In the instant case, Ms. Waterman and the Commission aver that sexual orientation was a factor in the employment patterns, but this is wholly denied by the Respondents who claim that in the employment practices of NLA sexual orientation never played a role and that people were employed or fired according to their deserts.

If the Commission can show that sexual orientation played a role and was a proximate cause in the negative decisions accorded the Complainant,. it need not show that it was the only reason. If the actions were tainted by discrimination, the *Code* was breached. See *R. v. Bushnell Communications Ltd. et al.* (1974), 4O.R. (2d) 266 at 290 (C.A.); affirmed (1973) 1 O.R. (2d) 422 (H.C.); Holden at D/14, ¶8; *Horton v. Niagara (Regional Municipality)* (1987), 9 C.H.RR. D./4611 at D/4615, ¶35812.

Standard of proof. In the absence of admitted wrongdoing this Board must decide the case on the balance of probabilities, which is the common civil law standard. See *Holden v. CNR* (1990), 14 C.H.RR. D/12 (F.C.A.); *OHRC and Dunlop and others v. The*

Borough of Etobicoke (1982) 3 C.H.R.R. D/78/1 at D/783 (S.C.C.).

This standard may be satisfied either by direct or circumstantial evidence or a combination of both.

An inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inference or hypotheses. See *Balbir Basi v. CNR Co.* (1988) 9 C.H.R.R. D/5029 at D/5038 (CHR Tribunal); Vizkelety, *Lc.*, p.142; Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* [Toronto: Butterworth, 1992]; pp. 37 ff.)

It is the nature of many human rights cases that the reasons for alleged discriminatory actions must often be inferred because they have taken place in private, away from other people's observation, or because they deal with motivations.

The latter is at issue in the instant case. Was the delay in Ms. Waterman's permanent engagement an aspect of ordinary business procedures and necessities, as Respondents claim, or of sexual discrimination emanating from the president of the company, as Commission and Complainant aver?

"*Poisoned work environment*". The Commission submits (pp.5 ff.) that the circumstances of this case justify its contention that there existed at NLA a "poisoned work environment". In *Lee v. T.J. Appleby's Food Conglomeration* (1987), 9 C.H.H.R. D/4785, ¶ 36999, I characterized such an environment as one that "exhibits an atmosphere of prejudice which makes work difficult or impossible for the employee".

If indeed there existed at NLA this kind of atmosphere, for which management itself was in part responsible and which remained without redress and correction, then discrimination against those affected harmfully thereby could be said to have occurred. (*Dhillon v. F.W. Woolworth Company Ltd.* (1982), 3 C.H.H.R. D/760 ff.) Could NLA be characterized as that type of environment for homosexuals?

In her Complaint, which forms the basis of these hearings, Ms. Waterman did not make that allegation. Her 38 points do not mention it, and the Respondents therefore objected to the introduction of this subject. They held that the Complaint could have been amended to that effect, but was not, and hence this Board has no jurisdiction to deal with this allegation. (Submissions in behalf of NLA and Vince Tonna, ¶ 221.)

I believe that the Commission's characterization of conditions at NLA as hostile or poisoned, and applying thereto the above-cited jurisprudence, is not relevant in this case. The testimony brought before this Board involved the observations of a number of persons who were called by the Commission and by the Respondents. They testified about what they or others did, what they heard from others and about others, about ongoing gossip in the company and particularly about the Complainant. Ms. Waterman testified that she was upset about this, but at no point did she characterize her work at NLA to be conducted in a hostile atmosphere. General experience shows that unfortunately members of minorities all too often endure a certain amount of negative feelings in the work place, but this is not what is meant by a poisoned atmosphere. That term points to an environment which is demeaning and hostile to the dignity of the employee. This was not claimed by the Complainant and despite some probings by this Board was found to be absent and therefore was not pursued. Finally, Ms. Waterman's desire to work permanently for NLA belies it. The emphasis given to this issue by the Commission is therefore not appropriate in this case and the Respondents' view of this Board's jurisdiction in that respect becomes moot.

On the other hand, it is important to establish whether the president of the company contributed to making the work place less than pleasant for Ms. Waterman. What the president and others in the company said is a central part of the Complaint (see ## 9,10,16), and the effect of these actions flows naturally from the allegation that the president's attitude was a major reason for Ms. Waterman's problems.

It is Ms. Waterman's claim that Mr. Johnson was ultimately responsible that she was not engaged when she had every right to expect a permanent contract. I must therefore examine the testimony in that regard and determine whether in fact he could be said to have discriminated against the Complainant because of her sexual orientation and thereby have violated the *Code*.

2. The evidence.

If the Complainant and her witnesses can be believed, Joe Thomas, the person empowered to engage her permanently, was deterred from doing so because Ross Johnson, president of NLA, was homophobic, had expressed himself as objecting to Ms. Waterman's open admission of her sexual orientation, and especially her association with persons of like

proclivity.

There is no question in the Board's mind that this aspect of the case would be resolved quickly if Joe Thomas, then vice-president of the company and the one with the authority to make Ms. Waterman's employment permanent, were able to testify. Unfortunately this is not possible, since Mr. Thomas died before these hearings began. Yet much of the testimony of needs pointed to what the deceased had said and done, for he was the linchpin in the hiring process. But that fact raised certain legal questions. Respondents held that previous jurisprudence severely restricts testimony when the key person is deceased and therefore cannot be cross-examined. Natural justice requires equitable access to the truth, and this is not possible in the face of certain claims which by their nature cannot be proved or disproved.

The issue of hearsay evidence. Generally, what a now deceased person is reported to have said is considered as hearsay evidence. Such evidence, while admissible in these hearings under the *SPPA* s. 15(1)(a), must be approached with caution. The witness reporting it must be credible and what is attributed to the deceased must be in consonance with the thrust of other testimony. The weight attributed to this hearsay evidence must also be weighed against other, conflicting and direct testimony. See *OHRC and Maddox v. Vogue Shoes et al.* (1991), 14 C.H.R.R. D/430, ¶24 (Ont. Bd. of Inquiry).

While Respondent counsel urged me to disregard hearsay testimony altogether (Submissions, ¶193) I have been guided by the recent decision of the Supreme Court of Canada in *R. v. Smith* (unreported, decision rendered August 27, 1992; reasons by the Chief Justice; see also below, Appendix I). The judgment deals at length with the admissibility of statements attributed to a deceased person. On pp. 15-16 it says:

> It has long been recognized that the principles which underlie the hearsay rule are the same as those that underlie the exceptions to it. Indeed, *Wigmore on Evidence* (2nd. ed. 1923) described the rule and its exceptions at ¶ 1420 in the following terms:
>
> ...Where the test of cross-examinations is *impossible of application*, by reason of the declarant's death or some other cause rendering him now unavailable as a witness on the stand, we are faced with the alternatives of receiving his

> statements without that test, or of leaving his knowledge altogether unutilized. The question arises whether the interests of truth would suffer more by adopting the latter or the former alternative...[I]t is clear at least that, so far as in a given instance some substitute for cross-examination is found to have been present, there is ground for making an exception. [Emphasis in original.]

The Court (at 19/20) says further, in reference to *R. v. Khan*, [1990] 2 S.C.R. 531, that

> [it] should not be understood as turning on its particular facts, but, instead, must be seen as a particular expression of the fundamental principles that underlie the hearsay rule and the exceptions to it. What is important, in my view, is the departure signalled by Khan from a view of hearsay characterized by a general prohibition on the reception of such evidence, subject to a limited number of defined categorical exceptions, and a movement towards an approach governed by the principles which underlie the rule and its exceptions alike....[R]eliable evidence ought not be excluded simply because it cannot be tested by cross-examination. The preliminary determination of reliability is to be made exclusively by the trial judge before the evidence is submitted.
>
> ...The criterion of "reliability" -- or, in *Wigmore's* terminology, the circumstantial guarantee of trustworthiness -- is a function of the circumstances under which the statement in question was made.

When Respondents first moved to exclude the testimony of Stuart Kent (to be discussed *infra*) because it was hearsay, I tended to agree, but later reversed myself, having had the opportunity to study *R. v. Smith* which had not previously been available to me, as well to review precedent human rights adjudications regarding the leeway given this Board by *SPPA* s. 15(1)(a) (e.g., *Commodore Business Machines Ltd. and Ontario Ministry of Labour* (1984), 49 O.R. (2d) 17,10 (Div.Ct.); see also Appendix I, *infra*). The name of the deceased Joe Thomas had already been cited on several occasions in the proceedings, and I concluded that more would be gained in the search for the truth by admitting the testimony than by excluding it. The challenged testimony would fit into an already established pattern which could be judged as a whole and thereby make it easier to view the test of reliability. At the same time I am aware that this places an extra burden on the Board when assessing

the credibility of witnesses who reported on conversations with Mr. Thomas.

In this respect, as well as in my general approach to the hearings, I have on occasion used the discretionary powers given to tribunals by *SPPA s.* 15(1), to allow certain types of testimony and curtail others. All this has had but one objective, which is to make sure that not only the letter of the law but also natural justice be served.

Similar fact evidence. Respondents raised this issue with regard to the anticipated testimony of Stuart Kent. As will be seen in its discussion, I found it indeed to contain similar fact evidence which I needed to disregard.

The same is true with the evidence proffered by John Alexander. After having heard the testimony, I judge the objection of counsel to be well founded and have discounted the evidence it as showing primarily disposition and propensity. The jurisprudence upon which I have drawn will be cited *infra*, when the testimony is discussed.

Testimony. The Complainant had begun to work for NLA on a contract basis in January 1987, and while admittedly she had at first not sought permanent employment apparently changed her mind later, but was not successful in obtaining it. According to Mirjana Lippard, who started work at NLA in 1986 and is today its Director of Financial Administration, the person who would have been in a position to engage her was Joe Thomas. She was then Manager of Group Billing and had a talk with Mr. Thomas concerning Ms. Waterman's desires.

> Q. Did you have a conversation with Joe Thomas about Ms. Waterman's employment status?
>
> A. Yes, I did.
>
> Q. When was that?
>
> A. In January 1988.
>
> Q. In what circumstances did you have that conversation?
>
> A. We were going on a sales call to Montreal.
>
> Q. ...Could you tell us what was said in that conversation about Ms. Waterman?
>
> A. Basically that the reason that she had not been hired on a full-time basis

was because of top management's narrow-mindedness when it came to gay individuals.

Q...Did Mr. Thomas refer to management by name?

A. Yes, he did.

Q. Who[m] did he name?

A. Ross Johnson and Robin Buckingham. (Evidence, V:132-133.)

When asked in cross-examination whether she had ever discussed the matter with Ms. Buckingham, the answer was no.

Q. She has never told you not to hire anyone because they were gay?

A. No, she did not.

Q. She has never said to fire anyone because they were gay?

A. No.

Q. With respect to Ross Johnson, he has never told you to fire anyone because they were gay?

A. No.

Q. Nor has he ever told you not to hire anyone because they were gay?

A. No.

Q. As far as you know today, there are homosexual employees at National Life who were there at this time, who remain there today?

A. Yes. (V:145-146.)

I found Ms. Lippard to be a straightforward witness. Respondent counsel devalued this testimony by speculating that if the testimony of the investigating officer had also been introduced a different picture would have emerged. (Submissions ¶ 196.) Precedent cited was *Virginia Carol Forsyth v. The Corporation of the District of Matsqui, Matsqui Police Service*, (1988) 10 C.H.R.R. D/5854, a decision of the B.C. Human Rights Council, which said at 5459,

> I note that Deputy Chief Vanderhoek was not called to testify for the respondent and can, therefore, reasonably infer that his evidence would be adverse.

The precedent is, in my view, not applicable to the instant case. The inference

that the investigating officer of the Commission has evidence that the Commission withholds, makes an assumption to which I am not willing to agree. I have dealt with this in a general way in my First Interim Decision (Appendix A) and accept Ms. Lippard's testimony as credible. I believe Joe Thomas to have said that the Complainant failed to obtain a full-time job because of Mr. Johnson's and Ms. Buckingham's narrow-mindedness; but it does not say that they told him not to sign Ms. Waterman to a permanent contract, or whether his statement was an accurate judgment of their attitudes which, with regard to Ms. Waterman, he had to respect or chose to respect. I do believe, however, that Mr. Thomas expressed himself in the manner cited by Ms. Lippard.

As to the investigating officer, I note that Respondents objected to his being called altogether. Had he appeared without restrictions he could have been examined with regard to the above-cited assumptions.

I turn to testimony of Susan Stanfield, a witness for the Respondents. She serves currently as Director of Human Resources at NLA, and was formerly the Manager of that division. It fell to her to interview Ms. Waterman when she first came to NLA. The latter had been with Transamerica, and when its group business was sold to NLA she was taken over as a temporary employee in order to give continuity to the business for which Ms. Waterman had been responsible. During the interview the Complainant told Ms. Stanfield that she was interested in a job at NLA but preferred to continue on a temporary contract basis. Ms. Stanfield at that time prepared an employee profile with a note saying, "contract employee, wants 30-35 hours a week". (Exhibit 26).

Ms. Waterman explained that she suffered from rheumatoid arthritis and that this condition made it advisable for her to rest, if necessary, and that a contract position would be preferred to full-time employment. (Evidence, vol. VII:45-49.)

This scenario is further supported by the unchallenged testimony of David Kent, currently Vice-President Group Financial Administration at NLA and at the time of Ms. Waterman's hire Director of Group Underwriting/Marketing. According to him, there was in any case no full-time position available at NLA at the time, if Ms. Waterman in fact had applied for it. (VII:89-90.)

Ms. Stanfield's notation in Exhibit 26 stands in direct contrast to the

Complainant's testimony that she was interested in full employment from the beginning; that she had other offers for full employment and was persuaded by Joe Thomas to stay on because he had special opportunities for her, one of them becoming his Assistant, which she said she chose. (Evidence, II:76 ff.). But other witnesses' testimony averred that such a position did not exist then and was never created. (VII:56 ff.; VIII:62.)

Finally, Ms. Buckingham testified that she herself had asked Joe Thomas whether he had offered the Complainant full-time employment. Her notes indicate that Mr. Thomas agreed they had talked about it but that no action had been taken. (VIII:81; Exhibit 30.)

The notes which Ms. Stanfield made at the time of the interview appear to me to record the true facts and suggest that in this respect Ms. Waterman's memory is faulty. Ms. Stanfield would have had no reason to make this notation at the time had the conversation not taken place. I believe that Ms. Waterman has remembered the sequence of her intentions incorrectly, but there is no reason to believe that consequently her other testimony is to be automatically discounted.

For it is clear from Ms. Buckingham's above-noted conversation with Joe Thomas that later on Ms. Waterman did indeed desire a permanent position and was asking various departments about the lack of progress in obtaining it. The question therefore remains why she was not offered such a position, when in some respects -- as during an operation she underwent -- she was treated like a full-time employee. (Evidence. II:188: V::31 f.; VIII:94)

Respondents submit that in October 1987 Joe Thomas sent a document to Human Resources for evaluation. It contained a proposition to make the position "Manager, Group Special Accounts" a full-time position, the intent being that Ms. Waterman would occupy it. The document was evaluated by Hay Consultants, an outside group, and upon return approved by Ms. Buckingham. (Evidence, VII:13 f.; VIII:65-69; Exhibits 29, 35.) It did constitute a plan for paying Ms. Waterman $ 40,000, but on an hourly basis, which is to say that she would not become a full-time employee at this point. (See Evidence, VII:60 f.) The question remains: Why -- when Ms. Waterman was paid a significant annual wage -- was her temporary status continued?

According to Ms. Stanfield's testimony, the reason lay with Joe Thomas, who

could have made the Complainant's status permanent had he decided to do so. On Nov. 3, 1987 Ms. Stanfield made a notation, saying: "On hold until response from J. Thomas". (Evidence, VII, p.60.) While this testimony effectively counters allegation # 11 of the Complaint Form, it leaves the previous question unanswered. If on the one hand Mr. Thomas put in for Ms. Waterman's full-time employment, why -- when the evaluation, including salary level, was approved -- did he not follow through?

Respondents explain this by pointing to the developments which took place two days later. On November 5, 1987 a memo was sent to all employees of NLA advising them that the company was being sold to Continental Insurance and that for the time being a hiring freeze was in force. Also, from here on, every new position would have to be justified to top management in New York and approved by them. (Evidence of Vince Tonna, VIII:5.) With group business (Ms. Waterman's area of competence) in poor shape, exceptions to the freeze did not take place there, but did in the individual underwriting area. Still, in a November 12 note to Joe Thomas, Ms. Buckingham saw no problem in making Ms. Waterman full-time if he so ordered it. He, however, indicated that he did not wish to change Ms. Waterman's temporary status at this time. (Evidence, VIII:78; Exhibits 36, 37.)

It is Ms. Waterman's belief that the key to Joe Thomas' apparent indecision concerning her lay not in the hiring freeze instituted by Continental, but elsewhere.

In her testimony, she referred to a luncheon conversation with Joe Thomas. He told her that some members of management, including the president, were uncomfortable with her presence in the company.

> He initiated the lunch. He told me he needed to speak to me. Basically, what he said to me was...Mr. Johnson was homophobic, and that was well known. That once again, there were other members of the management team...who had a problem with my presence. It made them feel uncomfortable, that it was noticed that me and another person were having lunch together.
>
> Q. Who would that person be?
>
> A. That is Ms. X. [The transcript reveals that party's real name, but "X", is used here, because subsequently I ordered a ban on the publication of her name; see Appendix K.]...Anyway, basically, Mr. Thomas told me that it had been noticed

that X. and myself had had lunch together every day, and spent our break time talking to one other, and that was making people feel uncomfortable. And, that if I wanted to become a full-time employee of National Life, that that had to stop.

...it had also been noticed that there were a number of individuals with whom I sat and had lunch with in the cafeteria...These other individuals were also suspected of being gay, male and female, and prior to my arrival at the company, these individuals were very quiet and basically sat at their desks, and didn't talk to anybody. But, when I came to the company, I, you know, being a friendly person, spoke to this one and that one, and that we actually sat together in the cafeteria at a table and ate lunch together, and that this was not an acceptable thing to do, that it was making people feel very uncomfortable to see a grouping of us sit together.

...I could not understand why. I said, "You know, certainly, we are just a group of friends and there is nothing that anybody does, or says, or, you know, there is no behaviour that gets carried on that should make anybody to feel uncomfortable. There is nothing outrageous going on here. We are just a group of people sitting and talking and eating lunch together"...I then also brought up the fact that here were many other people who sat and had lunch together every day and had been doing so for the last 15 years, and it was okay for them but not for us in this situation?

Q. Did Mr. Thomas give you any answer to that question?

A. Yes, he did. He said that, you know, the difference was that we were known to be gay and that it made people feel uncomfortable. I was also told that it had come to his knowledge that the same group of people were plan ning to go to the Christmas dance and to sit together at the Christmas dance, and he highly recommended that this did not happen because it would most definitely be considered making a social statement.

Q. Did Mr. Thomas tell you why he was giving you all this advice?

A ...he was saying to me that I had to stop...hiding my identity if I wanted to succeed in my career path at National Life. That is basically what he had to

do because he himself was gay, and yet had to remain closeted about it in order to be successful. (Evidence, vol. II:93-99.)

When asked how she reacted to all this she answered that she could not agree to any of it and certainly would not hide her identity.

Q. How did you feel about being given this advice.

A. I was very upset about it, and I was very, very angry about it. I felt it was outrageous. (II:100.)

She also testified that to her knowledge the excuse about the wage freeze did not hold because in addition to a new vice-president three clerical staff members were hired -- but not she.

Subsequently she sent Joe Thomas a memo (dated Dec. 3, 1987, Exhibit 5, tab 6):

> Joe, at our last regular Monday morning meeting you advised me that there was not going to be any additions to permanent staff until the sale [of NLA to Continental] was finalized. Since that time I have noticed additions to the job posting board located on the second floor. I do not understand why we continue to post positions if it is not our intent to hire. I can only assume that the freeze does not apply to replacement positions. If that is the case I do not understand why I can't be put on a permanent basis immediately, as the job I am currently doing is in replacement of resigned sales staff.
>
> Joe, back in May of 1987 I told you that I was seeking job security and the addition of group insurance benefits to my compensation. At that time and since that time I have been offered employment opportunities from other sources. You assure me that National Life would be willing to provide me with permanent employment (ie. job security and benefits). I have been working for National Life for 8 months and the offer of permanent employment from you goes back 7 months. I am anxious to enjoy benefits (ie. 6 month routine dental) and I would like to have a sense of job security.
>
> I would really appreciate if you would give my thoughts some consideration.
>
> Thanks.....Jan.

She testified further that Mr. Thomas's verbal response pointed out that the three clerical positions were of the junior kind, and the one exception appeared to be the

new vice-president. Because Ms. Waterman was still a temporary employee she did not receive the transition bonus vouchsafed to full-time staff.

When she talked to Mirjana Lippard about it and indicated that she was thinking of filing a complaint Ms. Lippard suggested that she ought to speak with Delores Garbett [MacKenzie].

> Delores Garbett confirmed to me. yes. that there had been a problem with Ross [Johnson] and with other senior management with regard to my sexuality and my lack of willingness to hide that, but she felt that it had been overcome, and that if I would wait a little while longer and not seek legal action, that there were going to be some big changes and that everything would work out okay. She even went so far as to suggest that perhaps Ross Johnson and I should go out for lunch, or dinner, and hash it all out and, you know, basically just work everything out, that everything could be...would be fine in a while.
>
> Q. What happened next?
>
> A. That was on a Friday. On Monday, I came to work and Joe Thomas has resigned. (II:109-110.)

However, this hearsay testimony with regard to Ross Johnson's alleged homophobia must be disregarded in view of the fact that Ms. MacKenzie categorically denied having made the above remarks. (VII:19; see *infra*.)

Joe Thomas was replaced by Vince Tonna, which led eventually to his offering a permanent position to Ms. Waterman, but that offer was subsequently withdrawn. (This issue will be dealt with *infra*, under *B. The Hiring and Firing of the Complainant.)*

As stated, Ms. Waterman's testimony did not go uncontradicted. Ms. [Garbett] MacKenzie testified that she had talked to her as well as to Joe Thomas about her engagement. In a note made in June 1988 she wrote:

> Jan asked to see me and told me she was going to see a lawyer because she had not been put on full-time staff. I asked her what she had been told by Joe Thomas. She indicated that initially she had been told we were not hiring because of the sale of the company, but she felt that was not true and the company was discriminating because of her sexual preference. I told her that

I did not believe that to be true. Jan then indicated that she felt that maybe Joe Thomas was against putting her on the full-time staff because they had not been getting along recently. I could not comment on this statement. I suggested she go back to see Joe Thomas and she told me he was impossible to see...

In brackets I have put,

...I knew at the time Joe was leaving the company and I agreed with her statement...

The witness read further from her notes:

I did [go and] ask Joe Thomas what the real reason was behind Jan not being put on full-time staff and he assured me that initially it was because of the sale of the company, the future of the Group Department was very unclear and that was because of the size and the fact that we were losing money. And he told me that since the sale that he had been a bit unhappy with Jan's attitude, and whether he had told her that or not, I have no idea....That is the only reason he gave me. (Evidence, vol.VII:17-21; Exhibit 25.)

She advised Ms. Waterman that she would try and get some answers and eventually, knowing Mr. Tonna would take Joe Thomas's place, spoke to him and conveyed Ms. Waterman's concerns.

Q. Now you say in your note that you were assured Jan would be offered full-time employment. What did Mr. Tonna say?

A. He told me that it was on the list of things that had to be dealt with. (VII:19.)

Ms. MacKenzie also testified regarding her alleged remark (*supra*) that Ross Johnson had a problem with the Complainant's homosexuality, but you thought Mr. Johnson had overcome it.

Q. Did you say this?

A. No.

Q. Did you make any similar statement about senior management?

A. No, I did not.

Q. Did Mr. Johnson ever tell you he had a problem with Ms. Waterman's homosexuality?

A. No, he did not, he had no reason to. (*ibid.*)

In weighing the contradictory accounts of the witness and Ms. Waterman regarding their conversation I give preference to the written notes as reflecting the true facts better than Ms. Waterman's memory. However, this does not mean that all of her testimony is to be disregarded. It will be carefully examined and when supported by other evidence it will be given proper weight. All witnesses, including the Complainant, were testifying to events that happened in 1987 and 1988, and errors are bound to occur. It is the task of this Board to sort them out.

There was testimony that Mr. Johnson had called the Complainant "Mr. Waterman" on more than one occasion, and to have made remarks about her attire as well as her use of cologne. The evidence was supplied by Helen Melo, a ten-year employee of NLA and then working as a secretary whose location was near Mr. Johnson's office.

> There was one day when I was sitting at my desk...I noticed Mr. Johnson had come out of the elevators towards his office and on his way to his office, he was murmuring, "I see Mr. Waterman was here".

She believed that Mr. Johnson made the remark because of Ms. Waterman's cologne which had a "lingering effect". (V:117.) The accuracy of her testimony is strengthened, in my view, because she was unaware of Ms. Waterman's homosexuality and therefore was not attributing any homophobic motivation to Mr. Johnson's remarks. (V:120.)

A similar account was rendered by Lina Massaro, another veteran employee of NLA, who was then coordinator of the group secretarial unit.

> Q. How did you learn that Ms. Waterman had lost her job?
>
> A. ...she came off the elevator, and she seemed very upset as she walked by my desk. At that time she said, "I'm fired".
>
> Q. Did you have any conversation with Mr. Johnson about Ms. Waterman's termination?
>
> A. Yes, I did.
>
> Q. When was that conversation?
>
> A. It was the day after Ms. Waterman was let go.

Q. Where was that conversation?

A. At my desk.

Q. Could you describe for us the content of that conversation?

A....it was not unusual that he [Johnson] would come up to the different areas, and he sat down in my guest chair and asked me how the atmosphere was like in National Life now that Mr. Waterman was gone.

Q. What did you say?

A. I did not answer him. (V:124-125.)

Both Ms. Melo and Ms. Massaro's evidence was totally credible and uncontradicted. As will be seen *infra* it plays an important part in my decision.

Regarding the "Mr". Waterman remark, Mr. Johnson himself stated that he might have said it, because at first sight the complainant appeared to him to be "a small man".

When Ms. Waterman first came to the company, as I have said, I thought she was a small man. I could have at that time, I could have... (Evidence,VII:146.)

I have trouble with that explanation. The two above-noted witnesses testified to two separate incidents which were not, as in Mr. Johnson's version, related to his first meeting with the Complainant. The testimony of Ms. Massaro is also revealing in another respect: it shows Mr. Johnson in effect inquiring whether Ms. Waterman's discharge had produced a change of atmosphere among the staff. Why?

Ms. Massaro testified that Ms. Waterman was a helpful and professional person (V:124). Why then would her discharge alter the landscape of the employees' feelings, and presumably for the better? The only conclusion I can draw from this is the fact that Ms. Waterman's open homosexuality was the background of his question. I shall return to this matter *infra*.

Concerning the matter of Mr. Johnson's alleged remark about the lingering cologne odor, Ms. Waterman testified:

Mr. Johnson came out of his office and looked at me, and turned around in front of the entire group of people [the secretarial staff] and said, "What is that smell? It smells like someone broke a bottle of cheap Brut cologne in here". And then he started...proceed to smirk and all the secretarial staff proceeded

to smirk and he walked away.

Q. How many people were present?

A. At least three.(II:114.)

I have no reason to disbelieve that Mr. Johnson made such a remark, and Ms. Melo testifies that she understood it to refer to Ms. Waterman. What he did, wittingly or unwittingly, was to reinforce the latter's perception that she was being talked about and was being embarrassed publicly.

Of a similar nature are the comments which Mr. Johnson is said to have made about the Complainant's attire. He was said on one occasion to have insisted that Ms. Waterman's outfit was inappropriate -- it was described as "survival gear" -- and that when seeing customers more conservative clothing ought to be worn. He strongly denied that he had ever insisted that women wear dresses at the office, and admitted only that he felt that a company like NLA would do better with a conservative image. But no company policy was in effect at the time. (Evidence of Mr. Johnson, VII:137 ff.; of Robin Buckingham, VIII:79 f.; of Ms. MacKenzie, II:21 ff.; of David Kent. VII:101.)

In my judgment, these allegations in and of themselves show only a tenuous connection to any perceived homophobia. Again, however, they doubtlessly enlarged Ms. Waterman's apprehension that she was the butt of unwanted comments from the president. From a legal perspective, there is no proof before this Board that there is a link between wearing or not wearing slacks and women's homosexuality. It did exist in Ms. Waterman's mind, but no testimony was proffered that others made the same inference.

Meanwhile, Ms. Waterman felt that others were talking about her "on a constant basis, which was very, very upsetting". (II:118.) She apparently had good reason to feel that way. Ms. MacKenzie, who was a witness for the Respondents, testified credibly that rumours about Joe Thomas, Ms. X. and the Complainant were "horrendous, unbelievable, changing every day". (VII:32-33.)

Stuart Kent, a co-worker of Ms. Waterman's and himself a gay person, testified that he had had conversations with his manager, Shirley Walker, as well as with Joe Thomas, concerning his socializing with the Complainant. He was told that continuing to do so would jeopardize his advancement in the company. (V:103 ff. 112. Ms. Walker was

unavailable and did not testify.) Respondents counter this testimony by averring that there was no proof that "socializing" was related to sexual orientation, and the late Mr. Thomas was also not available to explain why he had expressed this concern. Hence, Respondents held, no adverse conclusion could be drawn from these statements, especially since Mr. Kent testified that, though being gay, he had never been subjected to mistreatment or disrespect and had left the company voluntarily in order to advance his career. (V:113-114 ff.)

However, quite clearly Mr. Kent took it to mean that sexual orientation was the issue and testified that he had expressed this to Joe Thomas:

> I objected to his insinuation that I and Jan [Waterman] were somehow at fault, and I said I take offense to him and to Shirley Walker talking to me and that Jan and I should curtail our socializing and that the people who had concern with the issue were the ones that he should be talking to... (V:105.)

It is further interesting to note that Mr. Kent, though himself gay, suspected but did not know that Mr. Thomas too was gay. Apparently, Mr. Thomas took seriously his own advice, reported *supra*, that Ms. Waterman not display or sexual proclivity openly. He made no waves about his own proclivity.

I found Mr. Kent's testimony to be credible, and its chief impact is to give added credence to Ms. Waterman's account of her conversation with Joe Thomas (*supra*), though with regard to Mr. Thomas it is by itself remote and throws no light on his alleged culpability.

That remoteness also characterizes the testimony of John Alexander, a former, 31-year long employee of NLA and at the time manager of individual and group death lines. He testified about a certain incident regarding Mr. Johnson, and I need to analyze it more closely in order to clarify my judgment in this instance.

The witness reported on a conversation with Mr. Johnson which took place at a cocktail party.

> Q. What did Mr. Johnson say to you?
>
> A. He indicated to me that I had some people that were working for me that were of the gay persuasion and he did not feel that these "type of people"

should be working, that I should take steps to make sure that their employment was terminated....I asked him to whom he was referring and to the best of my recollection, the names of Louisa Tedesco, Francois LeClerc, and Karl Tomczak were three names that I recalled him using.

Q. Did you take any action following this conversation?

A. I reported to my superior at that cocktail party, and told her the nature of the conversation, what I had been asked to do.

Q. Who was your superior?

A. At that time, it was Mrs. Garbett [MacKenzie]....She said, "Please do not take any further action" and, "I will get back to you". I indicated that I had received specific instruction from the president and chief executive officer of the company, and I was concerned on that matter, not following through on them, and she said, "I will get back to you very soon", and that same evening she got back to me.

Q. When she got back to you, what did she tell you to do?

A. She told me not to follow through on what I had been asked to do, that the situation had been clarified, and that I was not to take any further action. (VI:51-53.)

Mr. Alexander agreed that two of three people named were known to have long lunches together, exceeding the time ordinarily allotted for this purpose. But he thought that the reason Mr. Johnson wanted to rid the company of the three had to do with their sexual orientation. The witness was aware, he said, that this went against the Code and he assumed that the president, too, knew this. Nonetheless, this order put him in a difficult position. (VI:64.)

Both Ms. MacKenzie and Mr. Johnson testified regarding the conversation on which Mr. Alexander gave evidence.

Ms. MacKenzie testified that only the names of LeClerc and Tedesco were mentioned by Mr. Johnson, and that he was concerned about their long lunches with Mr. Thomas. The latter was after all a vice-president of NLA and his excessive socializing with the two junior staff members was not fair to other staff. Sexual orientation was not the issue.(VII:26.)

Mr. Johnson's testimony agrees with Ms. MacKenzie's, and emphasized that it was the lunches that were the issue, and not sexuality. He also stated that Ms. MacKenzie urged him not to go through with it since the two employees were "the best performers in the area". (VII:149.)

Even if I find the testimony of Ms. MacKenzie and Mr. Johnson credible, the whole incident remains problematic. A cocktail party is a strange place to initiate the discharge of two employees, for whatever reason. If Mr. Johnson was concerned about long and liquid lunch breaks, the proper address for his concern was Joe Thomas, and in any case this would normally have gone through the two persons' superior who would have warned them. But discharge? And a curt warning from Ms. MacKenzie which Ross Johnson himself quoted to have been, "Back off, Johnson"?

It is difficult for me to believe that these extraordinary orders concerned luncheon breaks, i.e., matters that one would expect to be handled in an orderly, hierarchical fashion during business hours. I must wonder, in view of Mr. Alexander's opinion that two of the three men he had named were gay (VI:54), whether their sexual orientation played a role in the president's unusual request.

But, though having noted the dubious nature of the order Mr. Johnson had given, both as to content and circumstance, I find that it has no value in establishing the Commission's case linking Mrs. Johnson to Ms. Waterman in more that a remote fashion. It is the kind of similar fact evidence which is meant primarily to show propensity, and this has been disallowed by the courts.

In *R. v. Morin* the Supreme Court of Canada, [1988] 2 R.C.S., at p. 370, Mr. Justice John Sopinka wrote:

> ...the trial judge must determine whether it is relevant to an issue in the case apart from its tendency to show propensity. If it is relevant to another issue (e.g. identity), it must then be determined whether its probative value on that other issue outweighs its prejudicial effect on the propensity question. In sum, if the evidence's sole relevance or primary relevance is to show disposition, then the evidence must be excluded.

The Court ruled similarly in *R. v. C. (M.H.)*, [1991] 63 C.C.C. (3d).

I find therefore that Mr. Alexander's testimony does not relate in any proximate way to Ms. Waterman. However, it created -- wittingly or unwittingly -- the impression in Mr. Alexander's mind, that the real reason for Mr. Johnson's unusual request in an even more unusual setting was the sexual orientation of the persons involved.

What about Ms. MacKenzie's reference to Susan Burton in Human Resources and Julie Jako, Manager of Long Term Disability Department? They had made a comment to her about hiring too many gay people. (VII:33-34.) It appears from this testimony that there were persons in the upper echelons who did have problems with homosexual employees, though this does not connect Mr. Johnson to the alleged unequal treatment of the Complainant.

Further, there is the uncontested evidence that Joe Thomas was Mr. Johnson's long-time friend and associate. They had been together at New York Life, and their two families were seeing each other regularly at each others' homes. When Ross Johnson became president of NLA he persuaded Joe Thomas to join him in Toronto as a vice-president of the company, which the latter agreed to do. Eventually Joe Thomas left NLA to go into business for himself, and when Ross Johnson too quit the company he briefly worked for Joe Thomas. And all the time he knew that Joe Thomas was gay. (VII: 133-134,144.)

He further testified that in his previous work he had been associated with a number of gay people and had never had a problem with that. He called homosexuality "a fact of life". (VII:136.)

Q. Do you recall first meeting Ms. Waterman?

A. I do not recall first meeting Ms. Waterman. I recall the first impressions of Ms. Waterman.

Q. And what were your first impressions?

A. My first impression is I thought Ms. Waterman was a small man. I did not know Ms. Waterman was a woman.

Q. How did Ms. Waterman dress?

A. Khaki survival gear, which I mentioned to Joe Thomas, I did not think was the proper dress for people who were serving our clients.

Q. What would you regard as the proper mode of dress?

A. Whatever is in style and appropriate for women to wear.

Q...Have you ever said to anyone that you think women ought to wear dresses?

A. No. My wife does not wear dresses all the time. We have been married for forty years. I would never say that to her. She has a lot of costumes that are not dresses.

Q....Did your comments [to Joe Thomas] about Ms. Waterman's dress have anything to do with her sexual orientation?

A...I didn't know what her sexual orientation was. (VII:138-139.)

He went on to say that he was a "customer service nut", and expected staff to be dress accordingly, which I took to mean reasonably conservatively.

He further commented on allegation # 9 in the Complaint. He denied again that he had delayed Ms. Waterman's appointment and further disavowed that he had made any of the other discriminatory statements ascribed to him.

As a witness, Mr. Johnson appeared sure of himself and testified without hesitation. I came to the conclusion that he was convinced that he was a fair and non-discriminatory person. After all, one of his best friends was gay.

There was a good deal of argument whether Mr. Johnson had said that women should wear dresses, which was supposed to reflect on Mr. Johnson's attitude toward Ms. Waterman, who apparently always dressed in slacks. However, that allegation was not proven to my satisfaction, for I have concluded that in this respect I must disregard the testimony of the Commission's investigating officer, Wayne McCoullogh. His interview with Mr. Johnson was conducted in an inadequate manner and not cross-checked for accuracy. (See IX:17 ff., and my own inquiry of the witness, IX:48-51.)

We would know whether Mr. Johnson was culpable of breaching the *Code* if we would know why Joe Thomas acted the way he did toward Ms. Waterman, and whether this was done at the behest of Mr. Johnson.

We enter here the realm of speculation, and I will pursue it for a moment in order to make clear why my judgment cannot be based upon it.

Joe Thomas appears to have respected Ms. Waterman's professional ability, and seemed at one point set to engage her for a full-time position. Still, he did not do it. If the hiring freeze was the real reason for a while, it was temporary, and when it was over he still

did not proceed to give her the desired permanent appointment. Why? What role, if any, did their argument play?

Was it Ms. Waterman's open acknowledgment of her sexuality, something of which Mr. Thomas did not approve? He himself hid his sexual identity as best as he could, so that another gay staff member, Stuart Kent, was not aware of his inclination (see *supra*), though of course it did not prevent common gossip from dealing with it.

Did he withhold the job offer from the Complainant because of these sentiments or of opinions which is friend and superior, Ross Johnson, may have communicated to him?

Unless this can be believed on the balance of probabilities, we are faced with impermissible speculation. For were I to apply it to the dead person's motivation and, say, arrive at the conclusion that Joe Thomas himself had infringed the *Code*, I would thereby have to render NLA culpable as well (in accordance with s. 45 (1) of the *Code*) and do so without the possibility of allowing it a proper defense -- save to substitute other speculations for mine. It is one thing to permit hearsay evidence regarding Mr. Thomas, it is another to explore his motivations, unless they can be supported by direct evidence. In this case, they cannot, and Mr. Thomas took his motivations regarding the delayed job offer with him to his grave.

Summary of the evidence on subdivision A. Did the Commission discharge its burden of proof that Ms. Waterman's sexuality impeded her permanent engagement?

Support for this position may be found in the following testimony which was detailed *supra*.

*Ms. Lippard testified to a conversation with Joe Thomas in which he spoke of management's and Mr. Johnson's sexual narrow-mindedness.

*Ms. Waterman testified believably to the fact that prior to her joining the company other homosexual members of the staff were quiet about their sexuality, while she was open about it. She was consequently admonished to hide her sexuality and not, by associating with other gay or lesbian staff, to make a "social statement". This conversation with Mr. Thomas created in her a sense of outrage, and no doubt she

expressed herself accordingly. I speculate that this was the altercation which ended their earlier close relationship.

*Mr. Johnson had called the Complainant "Mr". Waterman on several occasions, one of which -- which *might* be excusable -- he admitted himself, while the second and third were attested by Ms. Melo and Ms. Massaro.

*Stuart Kent testified believably that he was cautioned by Mr. Thomas about his association with Ms. Waterman.

*Ms. MacKenzie testified to the many negative rumour about gay people, current in the company at the time, and that there was homophobia in the upper echelons.

On the other side of the ledger are the following considerations:

*Aspects of Ms. Waterman's credibility are subject to doubt. At least on one occasion a written memo has negated her account.

*Mr. Thomas, not Mr. Johnson, controlled Ms. Waterman's employment.

*Mr. Thomas, a gay person, was one of Mr. Johnson's close friends and had been brought to NLA by him.

*No one was ever reported to have been denied engagement or to have been fired by NLA because of sexual orientation. There were a number of gay and lesbian people working in the company, and there still are.

What conclusions can be drawn from these contradictory observations and testimonies?

It appears to me that homosexuals were not discriminated against by NLA, as long as they did not display their proclivity too openly. Ms. Waterman's coming broke this silent understanding, and she became henceforth a subject of managerial displeasure, for the company strove for a fairly conservative image, and appearances were important. She openly associated with her lover as well as other known homosexuals and apparently was the first to do so.

At the same time, she was professionally valuable to NLA and therefore kept on as a temporary employee. That she was open about her sexuality was uncontested. Some people at NLA (as no doubt in many other places) had a problem with that, and among

them were senior staff. (This might also explain Mr. Thomas's failure to issue her the desired contract, for he had specifically advised her to hide and display her sexual preference.) I therefore conclude that it was Ms. Waterman's openness about her sexuality which delayed her full-time employment and caused her to threaten legal action.

However, I do not believe that the Commission has discharged its burden of proof by connecting anyone directly to a breach of the *Code*, and that includes Mr. Johnson. Rather, it is the late Mr. Thomas who logically should be accused of having infringed the Code, and he is beyond reach. Had he been present, Mr. Johnson's perceived attitudes might or might not have been shown as a contributing factor. As it is, and for the reasons set out above, I cannot hold the deceased legally culpable, and therefore by itself the delay of Ms. Waterman's permanent engagement cannot be considered to have been a justiciable infringement of her rights.

In his closing argument, Counsel for Mr. Johnson asked why indeed Joe Thomas was not cited as a respondent by the Complainant. He was still alive when she signed the Complaint, as shown by Mr. Johnson's testimony. (VII:34.) That question was not pursued. I believe that Ms. Waterman did not consider Mr. Thomas the culprit, but Mr. Johnson, and she therefore targeted him instead -- though in this respect unsuccessfully.

However, one must keep in mind that there was a continuity of events, and the non-engagement of Ms. Waterman was not a discrete chapter that can be handled in isolation. The division here adopted is one of sequential convenience. It does not betoken that one chapter has been concluded and a new and separate one begun. The events adumbrated in this decision as (A) and (B) flow into each other and in the end must be considered together. The final question that will have to be answered remains: Was the Complainant treated unequally by NLA and any of its officers, in the sense of s. 5 of the Code, and further, was there a breach of s. 8?

B. The Hiring and Firing of the Complainant.

1. The evidence.

The final chapter in Ms. Waterman's employment by NLA was relatively brief, dramatic and decisive.

In June of 1988, after the resignation of Mr. Thomas from NLA, Vince Tonna

(who today is its President and Chief Executive Officer) was appointed to take his place. He had joined the company in 1982 and before his appointment was vice-president of the Corporate Division. In that capacity he had no contact with Ms. Waterman. By taking over Joe Thomas's place as vice-president and general manager of Group and Finance he now became Ms. Waterman's superior. (Evidence, VII:1-9.)

He met with his staff, including the Complainant. He is sure that at the time she told him of her desire to obtain full-time employment. She never talked about sexual orientation "and as a matter of fact, she was very pleasant". (VIII:11-12.)

On June 28, that is, not long after assuming his new position, Mr. Tonna sent a memo to Ms. Waterman (Exhibit 5-8) which read:

Subject Time Off

jan i am in the process of typing up an offer of employment for you effective july 1. in the letter it states that you have been paid vacation pay until april 29th and such we are offering you 1 weeks vacation to be taken between july 1 and april 30th, 1989. in 1989 you would be entitled to three weeks vacation. so.....if you would like to take a few days off i believe you would have them available.

please confirm.

thanks

vince

Subsequent to this note (which was a response to an inquiry from Ms. Waterman) the Complainant did take some time off. (VIII:15.)

Mr. Tonna prepared a letter of engagement, which was dated June 28, but not delivered to Ms. Waterman because she was away. During this time Ms. Garbett [MacKenzie] informed him that Ms. X. and Ms. Waterman were living together and that Ms. X. was working in Group Billing.

...that caused a bit of a problem for me but I was still prepared to make her an offer.

Q. What was the problem that it caused for you?

A. Well, I am, with my finance background, I was very concerned about having two people that lived together, were married or related, working in an area where there would be a possible conflict. In my opinion, there has to be a complete segregation of

duties in order that the company is not put at risk. One of my major responsibilities as chief financial officer is to safeguard the assets of the company, and I saw this as a possible conflict.

Q. Are you suggesting any impropriety?

A. Oh, no, not at all, but I am a believer that you have to take the steps to make sure that there is preventive medicine, if you will, put in place rather than reactive....so no, I wasn't suggesting impropriety, I just didn't want to have any possibility of anything.

Q...Now, was your view of the conflict affected by the fact that this was [a] homosexual relationship?

A. No, I treated it as I would any other relationship, whether it be blood or heterosexual couples. (VIII:16-18.)

He further testified that Ross Johnson was not involved in hiring Ms. Waterman, that it was he and he alone. (VIII:19.)

On July 12, upon Ms. Waterman's return, Mr. Tonna presented her with the letter of appointment (Exhibit 5-9.) She appeared satisfied and he proceeded to tell her that there was a problem with Ms. X. in her current position. She would have to move to a new suitable assignment when it became available.

Up to this time the facts of Ms. Waterman's engagement are not in contention. The differences -- and they are crucial -- begin at this point, and it is well to place them side by side.

Ms. Waterman's testimony:

I was about to sign the letter of offer when Mr. Tonna told me that there was a further condition attached, a verbal condition....that my friend X. would have to give up her job, and be transferred to another job. His exact words to me were, " Do believe that your friend speaks French...so we will just make her a translation clerk or something." (Evidence II:126-127.)

Mr. Tonna's version:

I had been told that she [X.] was fully bilingual and I believe I stated that when I talked about possible moves that because she was fully bilingual, there would be probably opportunities in translation and customer service who were

constantly looking for French-speaking help. (VIII:22.)

The difference in the two recollections is at this point not large, but, though subtle, it is there, and it becomes larger hereafter. Note that Ms. Waterman speaks of a condition being added to the contract, while Mr. Tonna speaks of an understanding.

Ms. Waterman recollected that the imposed condition was not observed anywhere else in the company, that there were others in relationship who were working not only in the same division but in the same department. (Her testimony, II:129-130., proceeds to cite a number of examples, from the president down.)

> If this was a ruling [she reported having said to Mr. Tonna], it was not being enforced anywhere...He proceeded to say to me, "Don't mess around. I know you and X. are lovers and you are living together", and...
>
> Q. What was your response?
>
> A. My response was, "No, sir, you do not know that". I said, "Do you have any proof...that we are lovers? And, secondly, X. and I maintain separate residences and I can prove to you that X. and I maintain separate residences". He refused to believe that.

The two did in fact live apart, which is borne out by Ms. X.'s testimony. (VI:73.) They were, however, as Ms. Waterman put it, "lovers".

Mr. Tonna recalls:

> She [Ms. Waterman] became very confrontational with the whole interview. I was quite surprised, I knew that this was a concern for me but I thought it would be very easily handled in our interview...
>
> Q. Do you recall what she said?
>
> A. ...her response to me was, "You'll never be able to prove that, we keep separate mailing addresses for tax purposes".
>
> Q...Did Ms. Waterman say she and X. were not living together?
>
> A. No, she said that I would never be able to prove it.
>
> Q. What if she had said they were not living together, what would you have done?
>
> A. Well, that is a whole different kettle of fish. I would have had to obviously go back to my sources and question them. Up to then I had no reason to

disbelieve anything anybody had told me.

Q. Now, you heard Ms. Waterman testify that she also said that she and X. were lovers. Did you say that?

A. No, those are words that are foreign to me. I have never ever used the term "lovers".

Mr. Tonna, proceeded to comment on people in relationship who were working for the company. One of these concerned a problem where one was reporting to another, but this did not apply to Ms. Waterman and X., since the latter was not reporting to the Complainant. (VIII:23-27.)

Ms. Waterman asked that Mr. Tonna put the condition in writing and he responded, she said, "No, what do you think. I am stupid?" Mr. Tonna denied this entirely and reiterated that he was not thinking of a condition but of an understanding which did not require a written document. (VIII:27.)

Q. What was Jan's reaction then, to the whole conversation??

A. Well, as I stated earlier, she was very confrontational. I had asked her to think about it, she was clearly upset, and was, as you know, in a huff and she left my office. (ibid.)

All this happened on the 12th of July. The next day Ms. Waterman presented Mr. Tonna with a letter which she deemed a suitable answer to his concerns. (Exhibit 5-10.)

Dear Mr. Tonna:

It is with great regret that I am writing you this letter.

You have offered me a full-time permanent position on the condition that my friend, X., agrees to transfer out of the Group Division. X. does not want to transfer out of the Group Division, and I do not have the power or control to change this. I understand that you are concerned that I will act in a preferential manner toward X. I will agree to sign an agreement to the following affect:

1. I have not or will act in a preferential manner towards X. If you have information to the contrary, I will terminate my employment immediately upon request.

2. I will not socialize with X. during office hours.

3. X. and I maintain separate residences.

Vince, I truly would like to be an employee of National Life, and I believe that my performance and dedication over the last 15 months is proof of that. I want to accept your offer, but I cannot enforce a condition that is not within my power.

Please consider what I can offer to do and let me know if you would like to discuss this further or if you would like me to leave at the end of the day....Jan Waterman.

On the stand, she commented further on this letter.

I was just grasping at straws to try and be accommodating in every way I could. As I said, seeing as what Joe [Thomas] had told me earlier was what he felt, if I played the game this way everything would be okay. I guess at this point I was saying, "Okay, I will do that, if that is what it will take in order, you know, to keep you happy, and to keep my job. I will do that".

Mr. Tonna responded by withdrawing his offer and discharged her forthwith. She left that day. Five days later she received a letter from him, detailing her dismissal (Exhibit 5-11):

Dear Jan:

You requested that your employment with the Company be changed from temporary to fulltime.

We regret that you were unable to accept our offer of fulltime employment on the basis it was presented.

We wish to thank you for your services during your temporary employment with the Company under contract dated February 17th, 1987.....

Enclosed were also a record of employment and an OHIP form as well as four cheques of payments due her, amounting to over twelve thousand dollars.

In his testimony, Mr. Tonna discussed the reasons for dismissing Ms. Waterman. He felt the Complainant's letter to be unresponsive to his concerns. He had in mind a conflict of interest and the company's internal security, while she talked of not granting X. any

preference. Further, she talked of a condition when there was none; and finally, he did not believe her written assertion that she and X. maintained separate residences, since the day before she had not acknowledged it but instead had challenged his ability to prove the contrary.

> I felt she was less than up front with me...I felt very uncomfortable that I could not trust...Jan in this position because I didn't feel she was up front with me in our interview. So I decided at that time based on this letter and the conversation the day before, that this wasn't somebody that I could work with, so I went to H.R. [Human Resources] and told them that I wanted to withdraw my Offer of Employment and asked them to prepare a letter to terminate her temporary employment. (VIII:29 30.)

Mr. Tonna went on to go into detail about other pairs of employees who, while in relationship to one another, did not have the type of potential conflict which would exist between Ms. Waterman and Ms. X. For instance, he discussed the employment of Ross Johnson's son and his work relation to his father, as well as his own case respective to Ms. Buckingham. When they began seeing each other on a more than casual basis they knew that one of them would have to leave the company and they decided it would be easier for Ms. Buckingham to find an equivalent job. However, despite many attempts to relocate she had to date been unsuccessful. Another case cited was the relationship of Rene Trudeau and Heather Williams. Mr. Trudeau reported of his own to the president that he was planning to marry Ms. Williams. Since there was no other place for her in the company she eventually left it. (VII:98-102; VIII: 26, 33-44., 56-58, 87-90.)

> In summarizing his relationship to the Complainant, Mr. Tonna stated:
> I, within two weeks of coming to the Group Division, having all the problems I have talked about [the Division's heavy losses], was able to put together an offer and present it to Jan. Mr. Johnson didn't interfere...H.R. didn't interfere. Nobody suggested that I not hire her. I made the decision, the decision was mine, the decision was Joe Thomas' the day before that, so it had nothing to do with Jan's sexual orientation. (VIII: 44-45.)
> There is, finally, an alleged remark of Mr. Johnson's, cited by the Complainant.

She averred that Lina Massaro had quoted the president to have said on the day following the dismissal that "he had no choice in dismissing me because someone else in the division and I are lovers".

However, since Ms. Massaro did not mention this in her account of the conversation she had with Mr. Johnson, the allegation must be discounted. (Evidence of Ms. Waterman, II:149; of Ms. Massaro, V: 124-125.)

2. Evaluation and Conclusion.

This, in brief, was the scenario of Ms. Waterman's near hiring and ultimate firing. Can her and the Commission's claim be sustained that this chain of events amounted to treating her unequally and that therefore s. 5 of the Code was breached, and also that s. 8 was breached as well?

Evaluation. Up to the contended moment of discharging Ms. Waterman, Mr. Tonna's activities were beyond reproof. His name had not figured in her employment relationship until he replaced Mr. Thomas, and one of his early actions was to offer the Complainant a permanent position. It seems therefore counter-indicated for him to withdraw that offer precipitously the next day. Why such speed? I picture the crucial meeting between the two on July 12 to have gone something like this:

After having proffered the letter of employment he wanted her to understand that a problem existed with regard to Ms. X., and that the latter would have to be reassigned as soon as a suitable position was available for her. I have no way of knowing whether and how he made his reasons for this clear to Ms. Waterman. In any case, this understanding, as he put it, was apparently taken by Ms. Waterman as an offensive condition, and she got very upset, "confrontational" (in his words). Having lived in a society which demeaned and contemned homosexuals, she saw this "condition" as another proof of homophobia of which she had suspected top management all along. She had not counted on the fact that her full-time engagement might impact on her friend, and suddenly the entire offer became, in her mind, badly tainted. I am sure she was not reticent in expressing her anger and "left in a huff".

Mr. Tonna was, as he stated, "surprised" by this sudden turn of events. He thought he was doing the right thing, both for Ms. Waterman and the company, but she did

not see it that way. There was clearly a profound misunderstanding between the two. It might have been avoided if Mr. Tonna had been able to communicate his responsibilities in a more felicitous way, taking into consideration that Ms. Waterman, as a homosexual, was highly vulnerable, and that her relationship to her friend was a crucial factor in her life at the time. In turn, her response to Mr. Tonna's statement was reflexive rather than rational ("You can't prove that") and was not the best way to respond, since de facto she and Ms. X. were "living together" in the sense of common parlance, but kept separate residences for tax purposes. The response she gave worsened the situation, for it put Mr. Tonna on the defensive and, as heard in his testimony, soured his taste for keeping her on.

I find the two differing views of the meeting understandable. Taking both parties at their words, Mr. Tonna was thinking of the welfare of the company, while Ms. Waterman felt deeply offended and took it as a slap at her and her friend's identity and dignity. Each one approached the happenings from a personal perspective and failed to grasp the other one's needs. Unfortunately, this happens all too often in human relations.

The last act in this scenario takes us to the next day, July 13. Ms. Waterman presented a letter which began with an apology: she expressed her regret -- at least this is the way I read it, as regretting the entire contretemps. Her tone was courteous and even pleading. She would make sure, she wrote, that Ms. X. would find no special preferment from her and the socializing on the job which she had heard had been previously criticized was going to end. She added that they would continue to maintain their separate residences.

She continued by saying: "Please consider what I can offer to do and let me know if you would like to discuss this further..". -- and then she ended surprisingly: "....or if you would like me to leave at the end of the day". (Emphasis added.)

How did she come to conclude her letter in this fashion? The matter was not raised in the examinations, and so I am left to interpret it as best as I can. I believe that this ending was related to something that was said during their meeting on July 12. Quite clearly, one side or the other considered an either-or as the resolution of the impasse, and I rather think it was Mr. Tonna. I say this because, when he received this letter which had a highly accommodating tone, he jumped at the opportunity of letting her go. I think it was a not altogether unwelcome solution as far as he was concerned. She gave him an opening and he took advantage of it.

Ms. Waterman had likely been somewhat of a thorn in management's side. While she had performed well in her work, she had done also what no one else before her had done: to make no bones about her homosexuality, of which she was proud as a natural part of her identity. To underline her grievances she had threatened to seek legal recourse, which brought Mr. Creswell, as legal counsel of the company, into action in this matter, and no doubt Mr. Tonna was aware of it. He resolved to engage Ms. Waterman and thereby avoid a public confrontation.

But the July 12 meeting convinced him that this was no solution, and her letter did the rest. He did not feel that Ms. Waterman had any grasp of what the company needed, and he let her go forthwith. The question then is: Was there, on the a balance of probabilities, a breach of the *Code* when he did this?

In arriving at my answer I have looked not merely at the moment of withdrawing the offer, but at the whole history of the Complainant's employment with NLA. It appears to have been troubled from a rather early time on, and this despite her unquestioned professional competence. In a business area which was generally losing money she was an undoubted asset; but her personal proclivities were not necessarily so perceived. While there was no direct discrimination against homosexuals at NLA, Ms. Waterman's open acknowledgment of her sexuality was seen as a disturbing element. In this respect I believe the hearsay testimony of what Joe Thomas had said.

Ms. X., on the other hand, did not have the problems her friend had. Apparently, she was a "closeted" lesbian (so she thought, though at least Ms. MacKenzie also knew and therefore informed Mr. Tonna; VIII:16-17) and she remains so to this day in her present employment. That is why she requested that her name not be published, and why I issued an order to that effect. (See Appendix K.)

Mr. Tonna's actions were unexceptionable up to and including July 12. He offered the contract and appended an oral understanding, as he considered it. He had learned of Ms. Waterman's and Ms.X.'s relationship just prior to the meeting and, knowing established company policy, he informed her that -- if she accepted the offer -- Ms. X. would have to be moved to a less sensitive position. However, it would be done only after a suitable alternative was found for her. The cited cases of Trudeau/Williams and his own were illustrations of a policy which I consider reasonable.

Ms. Waterman, of course, did not. She did not have the privilege of detachment and the "understanding" became to her an intolerable "condition" which touched on the most sensitive nerve of her identity. Not surprisingly she became "controversial", heated words were said, she was "upset" and "left in a huff". Mr. Tonna, noting this sudden outburst of emotion he had not foreseen, suggested she think about the matter.

She did just that and wrote "with great regret", proffering a counter-understanding which she thought would clear the air. I note that her three points (non-preference of X., non-socializing at during working hours, and keeping two separate residences) were all things she could do and did not involve any action from her friend. She had evidently discussed the matter with Mrs. X., for her letter states that her friend did not want to move.

It is clear that she did not want Ms. X. to be dislocated on account of her. The latter had made steady progress in the company and, understandably, Ms. Waterman was suddenly faced with a dilemma. If she accepted the offer, her friend would have to be moved. This put a different face on the contract, and she was unprepared to deal with it on the spot. Her "counter-offer" must be seen in that light, rather than that she was "unresponsive." Ms. Waterman and the Commission see this dilemma as an infringement of the *Code* s. 8. I do not see it that way.

In this respect, the company policy is not different from what is generally practiced in employment policies regarding nepotism. For that reason the *Code* makes a specific exception by stating,

> 24(1) The right under section 5 to equal treatment with respect to employment is not infringed where,
>
> ...(d) an employer grants or withholds employment or advancement in employment to a person who is the spouse, child or parent of the employer or an employee.

The spirit of the exception is clear: close relationships may interfere with orderly business. Many homosexuals consider their relationships as "spousal", and if Ms. Waterman did (which I do not know) she certainly had no reason to object. *In Leshner v. Ontario* (No. 2)(1992), 16 C.H.R.R. D/184, that very point was made, and "spouse" was interpreted to include homosexual relationships. That means that Ms. X. and Ms. Waterman

were treated the same way as an equivalent heterosexual couple, and the intent of s. 24(1)(d) is precisely to remove this from the odium of infringement. Thus, there was no violation of s. 8, quite aside from the fact that Ms. Waterman had not been asked by Mr. Tonna to do anything -- although no doubt he hoped that she would interpret the newly created dilemma to her friend.

The fact that Ms. X. testified that she left the company later on because she felt "uncomfortable" with rumours that floated about (VI::76), is of dubious value, in view of ambiguities surrounding her testimony regarding her exit interview. (VI:85 ff.)

A good deal of testimony was heard on whether Ms. X. was in a position to enter spurious information into the billing system which would have advantaged Ms. Waterman. Mr. Tonna testified that it was good practice to guard against temptation; businesses often suffer grievous losses from trusted employees. While no one suggested that any improprieties had taken place, it was wise to avoid the possibility of such an occurrence. Whether or not Ms. X. was right when she said that all her moves had to be checked out. there is no question that access to the computer system presents a multitude of opportunities to exploit it.

I therefore believe Mr. Tonna's explanation of his motive for mentioning the Complainant's relationship during their contractual discussion. However, the same cannot be said about his follow-up when, I believe, another motivation obtruded.

Ms. Waterman's response was courteous, regretful and, from her point of view, reasonable. Most important, *she asked for further discussion and emphasized that she wished to continue working* for NLA and that she was capable of making a contribution to its success. She hoped that Mr. Tonna would accommodate her or, if not , whether he would like her to leave at the end of the day.(Exhibit 5-10.)

He chose the latter alternative and, I suppose, with some relief. Ms. Waterman's presence had been a disturbing factor. This is made unmistakably clear by Mr. Johnson's uncontradicted remark to Ms. Massaro the following day when he asked her "how the atmosphere was like now that Mr. Waterman was gone." (V:125.)

Her uncontradicted testimony, as well as Mr. Tonna's statement, lead me to the following observations:

1. On the day after the Complainant's discharge the president of NLA already

knew that a temporary employee had been dismissed, and he found it important enough to make it the subject of conversation with one of the secretaries, sitting down at her desk to talk about it.

2. Ms. Massaro's testimony suggested that he was pleased with the dismissal, and his question clearly hoped to elicit a favorable reply form her. She however, declined to answer.

3. He himself did not fire Ms. Waterman; Mr. Tonna did. But the latter, being very new in his position and personally not well acquainted with Ms. Waterman, would likely not have acted as precipitously as he did had he not been reasonably certain that the president would approve. It is probable that Mr. Tonna, having worked at NLA for some years, was aware of Mr. Johnson's perceived attitude regarding Ms. Waterman's open homosexuality and of the general context this had encouraged. Ms. Lippard's testimony regarding Joe Thomas's view of Mr. Johnson's role, supports this conclusion.

4. Ms. Waterman's "unresponsive" letter to Mr. Tonna re-enforces the credibility of her testimony about the conversation she had with Joe Thomas (concerning Mr. Johnson and homophobia). For her letter repeats in essence what she testified Mr. Thomas had said to her: Play the game and you'll be okay. *Her written offer not to socialize or lunch with Ms. X. makes sense only when that conversation is taken into consideration. And that conversation dealt in part with the president's feelings about homosexuals and with the need to have the Complainant downplay her sexual proclivity.*

5. As president of his company Mr. Johnson, who himself testified that he was much concerned with appearance and image, had a special responsibility to guard the integrity of the work place and the dignity of all employees. He should have been aware that his off-hand, inappropriate remarks created a certain impression amongst his staff, and he cannot be absolved of its consequences. Thus, even though he has not been proven to have ordered Ms. Waterman's dismissal, the views he had expressed in this fashion are seen by this Board as a likely contributing factor in Mr. Tonna's decision and thereby constitute an infringement of the *Code*.

6. In his testimony, *supra*, Mr. Tonna stated that if he had known that Ms. Waterman and Ms. X. maintained separate residences it would have been "a different kettle of fish". But when he learned that this was indeed so, it made no difference at all and he

proceeded with her discharge.

7. This points to the conclusion that Mr. Tonna who started the whole process with the best of intentions, changed course abruptly on July 13. He spurned Ms. Waterman's offer to discuss the issue further and let her go then and there. He never spoke to Ms. X. to tell her of the company's policy. He wanted to be done with the Complainant, for her sexual orientation had now become a significant annoyance. When he fired her he did so because he believed that this was good for NLA, but in so doing he broke the law.

Human rights jurisprudence had established that if an action is tainted by a prohibited ground an infringement has occurred. (*Holden v. CNR* (1990), *supra.*) This was the case here, and I believe that Ms. Waterman's sexual orientation played a role in her discharge.

Respondents argue that Ms. Waterman, by her confrontational behaviour on July 12, had herself to blame for her dismissal and cited *Dhillon v. F. W. Woolworth Limited, supra*, at 6685:

> ...an employee...must control his anger in respect of his work environment, and his swearing and insubordination is not excuse because of the hostility he receives...Mr. Dhillon must hold himself ultimately accountable for his intemperate outburst and bear the very unfortunate consequences that follow from his loss of control.

Even so, while emphasizing that two wrongs cannot make a right, the Board in *Holden* decided against the employer, since the dismissal was disproportionate to the offense. In the instant case, which is broadly similar, I have reached the same conclusion. As officials of the company Messrs. Johnson and Tonna rendered their company culpable, in accordance with s. 45(1) of the *Code* and hence, with s. 5 and 9.

Remedies.

Special Damages. While both the withdrawal of the permanent contract and the concurrent dismissal of Ms. Waterman offended against s. 5 of the *Code*, the two incidents must be separated in order to assess the proper remedies.

1. *Withdrawal of the Offer.* The Commission argues that, if the Board finds that

the *Code* had been infringed, Ms. Waterman is entitled to restitution, and that this should consist of the wages she would have earned at NLA from July 13, 1988, until November 11, 1990, when she obtained permanent employment at Cigna. The interest accrued should be added to this amount, and the income Ms. Waterman received during this period from other sources should be subtracted from it.

I believe this conclusion to be unwarranted, for it is predicated on the assumption that Ms. Waterman was faced with an *illegal* understanding or (condition) and in its absence would have signed the contract. For, as indicated *supra*, I consider the understanding itself and the security considerations which underlay it to have been legitimate, but the same cannot be said for the precipitous withdraw of the offer. In this respect Ms. Waterman was treated differently and unequally from other people at the NLA who maintained special relationships.

What remedy can be fashioned to meet this particular infringement? It deprived Ms. Waterman of the *opportunity* to sign the contract, and this, as shown above, constituted an act of discrimination. But that does not mean that Ms. Waterman is therefore entitled to a remedy which would take her signature to the document as a *fait accompli*.

For I cannot simply assume that she would most likely have signed the contract anyway and that I should therefore award a remedy based on that assumption. The fact is that on July 12, once she had learned of the accompanying understanding or condition, she did not want to sign the contract. Should I reason that it is most probable that she would have acquiesced later on and would have accepted the offer? Her testimony that she would have done so after all is an *ex facto* assertation that cannot form a reliable basis for my judgement.

Taking Ms. Waterman's loving relationship to Ms. X. into consideration I cannot base an award on that speculation. Ms. Waterman was not asked to do anything about Ms. X., nor was she in any position to do anything about it, except to interpret an existing company policy. She herself wrote in her letter that Ms. X. did not want to move (I assume that, quite naturally, she discussed the issue with her after her meeting with Mr. Tonna). I do not know how she would have resolved that dilemma. Ms. Waterman might have decided against signing the contract in order to safeguard her relationship with her

friend. Hence, even though discrimination had occurred by the way the matter was handled, I cannot arrive at a proper restitution for the withdrawal of the offer.

2. *The dismissal.* That leaves me to consider the consequences of Ms. Waterman's discharge, i.e., the cancellation of her temporary employment. For though the issues are different they are not identical.

While the *withdrawal of the offer* constitutes the withdrawal of a potential which had unknown consequences, the dismissal from the temporary contract, which happened at the same time, terminated an existing condition which had an established track record. Since Ms. Waterman's rights were infringed by this termination, the damage it caused can be assessed with reasonable precision.

Until Ms. Waterman was fired she had a temporary contract, and after she was dismissed she did not find comparable employment until she received a temporary contract from Cigna. Hence, the period from July 14, 1988, until January 14, 1989, is the span for which restitution can and must be made.

Respondents argue that it took Ms. Waterman some three months before she sent letters and resumes to twelve insurance companies. Respondents believe that this was an unduly long time to begin her search for a new job, and that NLA should not be charged with this delay.

I disagree, for two reasons. One, this position does not take into account the hurt which a member of a minority experiences when he/she is rejected, and a consequent debilitating effect cannot at all be considered unusual. Two, even though Ms. Waterman's competence lay in underwriting she initially resisted going back to seek employment and facing the same problems again.

It is understandable, therefore, that she tried something else altogether. A month after her dismissal she joined a friend in business and doubtlessly hoped for profitable results. When these did not materialize she had to face the need of obtaining a new job. In September or October 1988 she began contacting insurance companies and received some encouraging letters in return. One of them was from Cigna, and on January 15, 1989 she started contract work with that company.

In computing the restitution I accept the amount suggested (though for

different reasons) by Respondent counsel, by subtracting from the amount Ms. Waterman would have earned, her temporary job with NLA, the income she received from other sources during that time span.

The sum is arrived at in the following manner: She would have received $25,860.11 in salary and incentive bonuses, minus the amounts already received from NLA ($ 4,668.75) and unemployment benefits ($ 6,441.00), for a total of $ 14,750.36.

Interest on this amount is due from the time the complainant was served, which I reckon to have been a month after it was signed, i.e., from October 13, 1988 until the time of this decision, fixed as February 11, 1993. (See *Cameron v. Nel-Gor Castle Nursing Home* (1984), 5 C.H.R.R. D/2170, at 2201, ¶18564; *Horton v. Niagara, supra,* at D/4617, ¶35831.)

The Divisional Court determines the interest rate as follows: for the last quarter of 1988, at 13%; for 1989, an average of 13.5%; for 1990, an average of 14.5%; for 1991, an average of 11.5%; and for the first quarter of 1993, at 7%. The total due on the sum of $ 14,750.36 is therefore computed to be:

> for the period in 1988, $ 415.03; for 1989, $ 1,991.30; for 1990, $ 2,138.80; for 1991, $ 1,1696.29; for 1992, $ 1,216.90; for the period in 1993, $ 181.81 for a total of $ 7.640.13.

The special damages are to be borne by NLA in accordance with s. 45(1) of the *Code*. As for Messrs. Tonna and Johnson, I have rejected the suggestion by the Commission that I rule with NLA to be jointly and severally liable. I have decided otherwise and, as respects special damages, have applied the judgement of the Supreme Court of Canada in *Robichaud v. Canada (Treasury Board)* (1987), 8 C.H.R.R. D/4326 at 4332-433; see also *Islington Village Inc. v. Canadian Imperial Bank of Commerce* (judgement September 16, 1992, O.C.G.D., unreported from transcript p. 1-2). Therefore, NLA alone will provide the restitution for special damages.

However, general damages are of another kind, and they flow directly from the culpability of Messrs. Johnson and Tonna for infringing the *Code*. Here, restitution cannot be made, but some balm for the loss of dignity and the hurt the Complainant suffered can be provided.

General damages. There can be no question that the infringement injured Ms. Waterman's dignity and demeaned her sexual identity. She is entitled to general damages,

in accordance with established jurisprudence.

Here, I require Messrs. Tonna and Johnson, to assume their share in the responsibility of having infringed the *Code*. I award Ms. Waterman three thousand dollars in general damages, one thousand dollars to be borne by each NLA, Mr. Tonna and Mr. Johnson.

The Commission has asked that apologies be extended to Ms. Waterman. I find these forced exercises to be inappropriate except in rare circumstances, and will not so order in the instant case.

The Commission has further asked me to order that a series of educational programs to be instituted at NLA. I am satisfied that the steps which the company has taken since the Complaint was signed. steps which are explained in the Respondent's written Submission ¶¶144-148, already meet the Commission's objective, and therefore no further order in this respect has been issued.

ORDER

This Board of Inquiry, having found that the Respondents have breached the *Code*, makes the following awards:

1. National Life Assurance Company of Canada is asked to pay Ms. Jan Waterman the sum of $14,750.36 in special damages, plus interest of $7,640.13, amounting to $22,390.49. In addition, it will pay her one thousand dollars ($1,000) in general damages, for a total of twenty-three thousand three hundred ninety dollars and forty nine cents ($23,390.49).

2. Mr. Ross Johnson is asked to pay Ms. Waterman one thousand dollars ($1,000) in general damages.

3. Mr. Vince Tonna is asked to pay Ms. Waterman one thousand dollars ($1,000) in general damages.

Toronto, February 5, 1993

W. GUNTHER PLAUT, BOARD OF INQUIRY

APPENDIX A

IN THE MATTER OF JAN WATERMAN AND THE ONTARIO HUMAN RIGHTS COMMISSION V. THE NATIONAL LIFE ASSURANCE COMPANY OF CANADA, ROSS JOHNSON AND VINCE TONNA, AND PURSUANT TO MS. WATERMAN'S COMPLAINT BASED ON THE ONTARIO HUMAN RIGHTS CODE, 1981, ch.53, AS AMENDED.

INTERIM DECISION

On September 13, 1988 Ms. Jan Waterman filed a complaint against the above-named Respondents, alleging that she had been discharged from the National Life Assurance Company of Canada ("NLA") because of her sexual orientation, and also because she had refused to infringe the right of another person, in contravention of the Ontario Human Rights Code ("the Code"), sections 4(1), 7 and 8 (now numbered 5, 8 and 9, as they will be cited hereafter).

At a preliminary hearing, on September 4, 1992, Respondents asked that they be given access to the notes taken in the course of the investigation by the officer of the Ontario Human Rights Commission ("Commission") who was assigned to the case. Respondents held that they could not conduct a proper defense without knowing who the witnesses that had been interviewed were, what they had said to the officer, and further whether in the report to the Commission the officer had withheld results of any interviews that might have been favorable to the defense. The Commission refused to accede to such disclosure.

This decision deals with only that issue.

THE LAW.

It has been established jurisprudence to consider the notes of the Commission's investigating officers as privileged and not subject to the inspection of Respondents. The standard precedent cited is *Salamon v. Searchers Paralegal Services* (1987), 8 C.H.R.R. D/4162, where Respondent asked for an "Analysis of Investigation" prepared in relation to the complaint. Chairman F.H. Zemans ruled on the motion.

> The respondents request the Board of Inquiry to issue a summons compelling the Ontario Human Rights Commission's investigator of this complaint to

> appear and produce the Commission's original intake questionnaire, the analysis of the investigation's findings and all other documents prepared by her that the Commission considered with respect to the complaint. The respondents also request that the Commission be compelled to reveal the names of two witnesses it intends to produce at the hearing.
>
> The Board of Inquiry refuses these requests on the grounds that there are no provisions in the Code or the *Statutory Powers Procedures Act* ("*SPPA*") for pre-hearing discovery. (Summary).

A recent Ontario Board of Inquiry ruled similarly. In *Adair v. K. B. Home Insulation Ltd. et al.*, 15 C.H.R.R. D/331 (1992), Chairman B. Adell said:

> The respondents asked for the full statements made by the witnesses during the course of the investigation, and for the names of witnesses. That material I would hold to be privileged...

Respondents do not argue that this has been the accepted position, but hold that a recent decision of the Supreme Court of Canada creates a new and in fact contrary precedent.

In *R. v. Stinchcombe* [1991], 3 S.C.R. 326, the Court considered the following scenario: A lawyer had been accused of breach of trust, fraud and theft. A former secretary of his was a Crown witness at a preliminary inquiry, where she gave evidence apparently favorable to the defense. After the inquiry, but before the trial began, the witness was interviewed by the police and tape recording were made of the interview. However, the witness was never called by the Crown and the application by the defense that the witness either be called or the police release the contents of the interview were rejected by the Court. The defendant was convicted and the Court of Appeal for Alberta affirmed the conviction. The Supreme Court allowed the appeal and ordered a new trial. Mr. Justice Sopinka, after reviewing the history of disclosure, said:

> It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information...I would add that the fruits of the investigation which are in the possession of Counsel for the Crown

> are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. (at 333.)
> The search for truth is advanced rather than retarded by disclosure of all relevant material. (at335.)
> There is the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. (at 336.)
> Where statements are not in existence, other information such as noted should be produced, and, if there are no notes, then in addition to the name, address and occupation of the witness, all information in the possession of the prosecution relating to any relevant evidence that the person could give should be supplied. (at 345)

> However, the Court did not make the requirement of full disclosure absolute. It is subject to the discretion of the Crown. This discretion extends both to the withholding of information and the timing of disclosure. For instance, Counsel for the Crown has a duty to respect the rules of privilege. In the case of informers the Crown has a duty to protect their identity. In some cases serious prejudice or even harm may result to a person who has supplied evidence or information to the investigation. (at 339.)

If this judgment, delivered with respect to a criminal proceeding, is applicable to human rights law, then the application of the Respondents in the instant case should be seriously entertained, subject to whatever exceptions the Supreme Court judgment would allow.

The question of the relation between criminal and human rights law was recently considered by Prof. T. Brettel Dawson in an interim decision under the *Code*, in the matter of *Anita Hall v. A-1 Collision and Auto Service and Mohammed Latif* (unreported, dated August 28, 1992).

> A Board of inquiry does not determine "guilt" but rather assigns responsibility for a discriminatory act or practice. For these reasons alone I believe that it

> is unwise to analogize grounds of complaint in human rights legislation with conduct controlled by the criminal law and to apply protections developed in the criminal context to other contexts (at p. 22).
>
> Unlike a criminal charge which is laid only after a police investigation, a human rights complaint may be filed as of right. While the Commission attempts to settle disputes informally prior to the filing of a formal complaint, it is only after a formal complaint has been filed that an investigation takes place. The investigation is non-partisan and aimed at identifying what took place and ultimately endeavouring to settle the matter in a non-adversarial manner. Unlike the laying of a criminal charge, the filing of a human rights complaint implies no suspicion on the part of the public body, of wrongdoing (p.23).

The Board also cited the Supreme Court's earlier caution that a "right or freedom may have a different meaning in different contexts" (*Edmonton Journal v. Alberta Attorney General* [1989] 2 S.C.R. at 1355). In fact, even while delivering the judgment in Stinchcombe, the Court cautioned that in a case of summary conviction offenses certain factors which were considered "may not apply at all or may apply with less impact". (at 342.)

Moreover, in *Stinchcombe* the potential evidence appertained to a specific witness whose testimony was not produced. In the instant case, and in the administration of the *Code* in general, the investigation is not surrounded by the prosecutorial aura associated with the police. I have no doubt that many a respondent, investigated by an officer of the Commission, feels that the powers and actions of the officer are "intrusive". However, the special powers of the Commission are never invoked when the respondent assists the Commission in establishing the facts of the case.

Moreover, while it is the purpose of the Code to empower the weakest elements of the population in that it makes a complaint readily available and takes on the responsibility of discerning its possible validity, experience shows that the vast majority of the complaints end in either a settlement or in the dismissal of the complaint by the Commission -- a dismissal usually recommended by the investigating officer. Fewer than five percent of all complaints proceed to a Board of inquiry.

Respondent Counsel has implied that there may be evidence in the officer's

notes which is withheld because it is favorable to the Respondent, and that therefore, as in *Stinchcombe*, the notes ought to be produced.

Personal experience leads me to believe that this implication is unjustified. The officer comes to the investigation without any apprehension of who is right and who is wrong. The Commission becomes a partisan only after the Commissioners, by vote, agree that a prima facie infringement of the Code has occurred and therefore ask the Minister to appoint a Board of inquiry. Until then, the Commission is an impartial searcher for the truth. Its agents and officers may not always carry out their tasks to perfection, and certainly often are seen as antagonists by potential respondents, but the kind of truth shading of which the police in *Stinchcombe* were suspected should not be laid at the door of the Commission.

In this vein did Chairman P. P. Mercer, adjudicating under the *Code*, characterize the analogy with *Stinchcombe (Roosma and Weller v. Ford Motor Company et al.*, June 5, 1992; unreported):

> Nor is the analogy with Crown's duty in *Stinchcombe* particularly apt; the Commission's role under the Ontario Human Rights Code is indeed not merely adversarial but these proceedings are also clearly civil and not criminal (pp.2-3).

There is another basic reason why the officer's notes, unless relied upon by the Commission, should not be accessible to the Respondent. Officers usually find potential witnesses very hesitant to come forward; they fear for their position and are therefore assured by the officer that their privacy and anonymity will be safeguarded. Without such assurance the whole process of establishing the facts through an investigation of the case would be severely impeded. The parallel with a criminal case breaks down on this point alone.

Moreover, in *Stinchcombe* there was a special and identifiable witness whose testimony was at issue, while in the instant case no such person has been targeted by the Respondents.

The latter have also invoked the *SPPA* and have cited s. 23(1), which gives a tribunal the power to regulate its own procedures. But in the past, human rights boards have hesitated to order pre-hearing disclosures, for which there is no provision in the *Code*,

and instead have asked for the production of materials which appeared relevant to the Board after the hearing has begun, taken advantage of s. 39(4) of the *Code*.

Counsel for Mr. Johnson has stressed that, while in criminal cases the accused faces a possible jail sentence, a human rights judgment too can have serious effects on the respondent party. An adverse decision by this Board would have an impact on the respondent's reputation, and the large damages which will be asked for (over $ 150,000) are a heavy threat to her client. The rules of natural justice should prevail in human rights cases no less than in a criminal court. Counsel has in fact indicated that s. 41(6) of the Code will be invoked and redress be sought from the Commission.

In principle, I have sympathy with counsel's position. Natural justice makes no distinction between criminal and civil law. Mental anguish and financial loss have their own serious effects upon the life of a person, and it is not the function of a Board to establish a ranking order of what is of greater or lesser impact. Each situation, like each person, must be considered separately.

But justice has two parts, and the Complainant has hers as well. Bringing a complaint against one's employer is in itself a difficult and often wrenching step, which many potential complainants never take. The possible loss of a job looms large and, even in the best of circumstances, the employee's relationship to the employer is clouded thereafter.

I can therefore not justify the direct and unreserved application of *Stinchcombe* to the matter before me. The particularities set forth in *Stinchcombe* are sufficiently different to deem the conclusions drawn there applicable to the instant case.

Therefore, the motion to have this Board order the Commission to produce the notes of the investigating officer is denied.

Decision rendered September 8, 1992.

APPENDIX B

IN THE MATTER OF JAN WATERMAN AND THE ONTARIO HUMAN RIGHTS COMMISSION V. THE NATIONAL LIFE ASSURANCE COMPANY OF CANADA, ROSS JOHNSON AND VINCE TONNA, AND PURSUANT TO MS. WATERMAN'S COMPLAINT BASED ON THE ONTARIO HUMAN RIGHTS CODE, 1981, ch.53, AS AMENDED.

INTERIM DECISION

This Order covers two matters, arising from the preliminary hearing on September 4, 1992:

1. The Respondents have requested an order requiring the Human Rights Commission to produce the investigatory notes of its officers.

The request is denied. Reasons will be supplied at a later date.

2. The Respondents have submitted a list of 13 particulars, containing information which they ask the Commission to produce.

The Commission is hereby requested to supply this Board with a response, setting forth

a. which of the particulars asked for it will supply; and

b. if it is unwilling to supply any, to state the reasons therefor.

An answer should reach this Board by September 11, 1992.

Toronto, September 8, 1992

APPENDIX C

IN THE MATTER OF JAN WATERMAN AND THE ONTARIO HUMAN RIGHTS COMMISSION V. THE NATIONAL LIFE ASSURANCE COMPANY OF CANADA, ROSS JOHNSON AND VINCE TONNA, AND PURSUANT TO MS. WATERMAN'S COMPLAINT BASED ON THE ONTARIO HUMAN RIGHTS CODE, 1981, ch.53, AS AMENDED.

I am in receipt of Ms. Kathryn I. Chalmers's communication of September 8, 1992. It requests that, in case the Commission does not agree to supply some or all of the 13 particulars listed in Ms. Elizabeth R. Turner's letter to Ms. Bickley of September 3, Ms. Chalmers be given an opportunity to respond to the Commission's submission.

That request is readily agreed to, and the Commission is requested to share with all parties its answer to # 2 of my Interim Decision (communicated on September 8).

That answer being due by September 11, any response thereto should reach me by September 15, 1992.

Toronto, September 9, 1992

APPENDIX D

IN THE MATTER OF JAN WATERMAN AND THE ONTARIO HUMAN RIGHTS COMMISSION V. THE NATIONAL LIFE ASSURANCE COMPANY OF CANADA, ROSS JOHNSON AND VINCE TONNA, AND PURSUANT TO MS. WATERMAN'S COMPLAINT BASED ON THE ONTARIO HUMAN RIGHTS CODE, 1981, ch.53, AS AMENDED.

I am in receipt of Ms. Kathryn I. Chalmers' further communication of September 15, 1992. It requests that this Board sustain the application to have the Ontario Human Rights Commission supply further particulars regarding items 4, 5, 8, 10, 12 and 13 listed in Ms. Elizabeth R. Turner's letter to Ms. Bickley of September 3. Ms. Chalmers provides reasons for her application, and these have been communicated to the Commission.

However, as regards case law, it is my view that the party bringing the motion needs to supply it, and I therefore would request Ms. Chalmers to submit it in order to buttress her application. The Commission will then have an opportunity to respond. I will thereupon rule on the matter.

Case law argument should reach all parties and me by September 21, and any reply thereto by September 23.

Toronto, September 17, 1992

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APPENDIX E

IN THE MATTER OF JAN WATERMAN AND THE ONTARIO HUMAN RIGHTS COMMISSION V. THE NATIONAL LIFE ASSURANCE COMPANY OF CANADA, ROSS JOHNSON AND VINCE TONNA, AND PURSUANT TO MS. WATERMAN'S COMPLAINT BASED ON THE ONTARIO HUMAN RIGHTS CODE, 1981, ch.53, AS AMENDED.

INTERIM DECISION

This interim decision deals with the sequential submissions made made by Ms. Chalmers, in behalf of respondents, on September 15 and 21, the reply from the Commission on September 23, and the response thereto by Ms. Chalmers on September 24.

1. I deem point (4) of the particulars contained in the September 15 submission to have been satisfactorily met.

2. The Commission does not at this time have to submit the names of potential witnesses.

3. The Commission is asked to fulfill, at the appropriate time, its undertaking "to provide the respondents prior to the hearing with the names and an outline of the anticipated evidence of witnesses whom it intends to call. The Commission will also provide continuing disclosure of relevant documents which come into its possession and on which it intends to rely at the hearing." (Letter of Sept. 22, 1992, p.2)

4. The Case Summary alluded to in the Commission's letter *(supra)* and in Ms. Chalmers' reply of Sept, 24, has not been introduced in the hearing, and therefore I cannot at this point rule whether or not it is deficient and further information needs to be given to the respondents.

5. The hearings will go forward as scheduled, on October 5. Counsel for the respondents will be free to raise the matter of adjournment then or later.

Reasons for the above will be given at a later time.

Toronto, September 25, 1992.

APPENDIX F

IN THE MATTER OF JAN WATERMAN AND THE ONTARIO HUMAN RIGHTS COMMISSION V. THE NATIONAL LIFE ASSURANCE COMPANY OF CANADA, ROSS JOHNSON AND VINCE TONNA, AND PURSUANT TO MS. WATERMAN'S COMPLAINT BASED ON THE ONTARIO HUMAN RIGHTS CODE, 1981, ch.53, AS AMENDED.

Respondent counsel moved that this board not call certain witnesses whose appearance was projected by the Commission. They felt that insufficient information was available to prepare an adequate defense and referred to case law applicable to this matter (*Adair v. K.B. Home Insulation Ltd.; Dubajic v. Walbar Machine Products).*

The board assured Respondents that sufficient time would be granted them to prepare for cross-examination of the witnesses, and that questions of case splitting would not arise therefrom. (See Transcript, vol. II:36 ff)

October 5, 1992

APPENDIX G

IN THE MATTER OF JAN WATERMAN AND THE ONTARIO HUMAN RIGHTS COMMISSION V. THE NATIONAL LIFE ASSURANCE COMPANY OF CANADA, ROSS JOHNSON AND VINCE TONNA, AND PURSUANT TO MS. WATERMAN'S COMPLAINT BASED ON THE ONTARIO HUMAN RIGHTS CODE, 1981, ch.53, AS AMENDED.

1. The commission informed the Respondent that it intended to call two witnesses who had not been previously scheduled, both of whom were found to be able to give direct testimony on matters at issue. One of these had been found and contacted only the night before, and the other was the investigating officer, whose personal notes had previously, by order of this board, been considered privileged.

Respondent counsel objected to this sudden development.

The board ruled that the first witness should be admitted, but gave assurance that the Respondents would be accorded ample time to prepare their cross examination, and would be granted an adjournment if so requested. The board reserved its ruling with regard to the investigating officer. (See Transcript vol. III:13-14: for the ruling, see Appendix L.)

2. Because the first witness, who lives in California and was presently in the city, needed to be heard at this point in the proceedings it appeared necessary to split the testimony of Ms. Waterman, the complainant.

It was moved by the Respondent counsel to exclude Ms. Waterman while this testimony was being heard.

While excluding a party is indeed unusual, Commission counsel agreed because of the special circumstances, and so did the Chair. (See Transcript, vol. III:17-18)

October 9, 1992

APPENDIX H

IN THE MATTER OF JAN WATERMAN AND THE ONTARIO HUMAN RIGHTS COMMISSION V. THE NATIONAL LIFE ASSURANCE COMPANY OF CANADA, ROSS JOHNSON AND VINCE TONNA, AND PURSUANT TO MS. WATERMAN'S COMPLAINT BASED ON THE ONTARIO HUMAN RIGHTS CODE, 1981, ch.53, AS AMENDED.

INTERIM DECISION

This decision concerns the motion of respondent counsel not to have the investigating officer appear as a witness in the above complaint.

Previously, respondent counsel had moved, and the Commission had objected, to make the investigatory notes of the officer available to the respondents. That motion was denied. The tables are now turned: the Commission desiring to call the officer as a witness, and the respondents objecting by aforesaid motion.

The Board holds that the late introduction of this witness who has all along been available to the Commission will not materially advance the proceedings at this stage. Hence the motion is agreed to.

However, should later developments in this case make it advisable that the witness be called after all, the board reserves its privilege to do so if in its opinion the quest for truth demands it and the law of natural justice for all parties is not jeopardized thereby.

Toronto, October 9, 1992

APPENDIX I

IN THE MATTER OF JAN WATERMAN AND THE ONTARIO HUMAN RIGHTS COMMISSION V. THE NATIONAL LIFE ASSURANCE COMPANY OF CANADA, ROSS JOHNSON AND VINCE TONNA, AND PURSUANT TO MS. WATERMAN'S COMPLAINT BASED ON THE ONTARIO HUMAN RIGHTS CODE, 1981, ch.53, AS AMENDED.

A motion was entered by Respondents to disallow any testimony by Mr. Stuart Kent which would report conversations with Joe Thomas, a former Vice-President of NLA, inasmuch as Mr. Thomas has since died and that such testimony would therefore be considered hearsay.

A further motion raised a similar objection to reported conversations with Shirley Walker. Because she was unavailable for cross-examination, testimony concerning her conve&rsation would not ne subject to testing and also fall under the category of hearsay.

Counsel argued that

> the admission of hearsay evidence to a denial of natural justice, and that the hearing in the case [cited as precedent in her argument] fell below the minimum requirement of fairness.
> (Transcript vol. IV:22)

Counsel further argued that the alleged conversation with Mr. Thomas were designed to show disposition, and that such testimony would have a prejudicial effect on the Respondents. (pp. 22, 27, citing *M.H.C. v. The Queen and Bell V. Ladas and Flaming Steer Steakhouse).*

The board decided, on the basis of arguments presented, that testimony regarding Mr. Thomas be excluded as intestable, but that it be admitted regarding Shirley Walker who, while unavailable, could surely be found and most likely be brought to the hearings.

However, at the next hearing the board reversed itself regarding the

admissibility of testimony involving conversations with Mr. Thomas, deceased. Having meanwhile had an opportunity to study available jurisprudence in greater detail, especially the recent decision of the Supreme Court of Canada, in *R. v. Smith*, unreported (decision rendered August 27, 1992; reason by Chief Justice) the board allowed further testimony by Mr. Kent.

The decision was reinforced by the fact that in previous testimony the name, actions and conversations of Mr. Thomas had played a significant role, it would appear arbitrary to now restrict Mr. Kent, and Mr. Kent alone, from enlarging the board's knowledge.

In addition, the wide latitude given to boards by *SPPA* s. 15(1) and ruling by other boards that the restrictions on hearsay evidence may therefore be loosened, have moved this board to adopt the above ruling. (pp. 36 ff; vol. V:3)

However, as in all testimony, and particularly when the person invoked in unavailable, the board wili have to assess the weight it is possible to accord such testimony.

October 13/14, 1992

APPENDIX J

IN THE MATTER OF JAN WATERMAN AND THE ONTARIO HUMAN RIGHTS COMMISSION V. THE NATIONAL LIFE ASSURANCE COMPANY OF CANADA, ROSS JOHNSON AND VINCE TONNA, AND PURSUANT TO MS. WATERMAN'S COMPLAINT BASED ON THE *ONTARIO HUMAN RIGHTS CODE*, 1981, ch.53, AS AMENDED.

Further Procedural Rulings

1. On Oct. 16, 1992, counsel for respondent NLA asked that the conversations which witness John Alexander had with National Life's counsel, David Creswell, concerning matters before this board, be considered to fall under the client/counsel privilege rule, and that therefore no such testimony be admitted. The parties submitted copies of legal opinions to buttress their positions.

When the motion was made, I advised the parties that I would reserve the decision and that, if I were to seek legal advice, I would so inform them, so that they might make submissions thereto, in accordance with s. 38(2) of the *Code*. However, I did not in fact seek legal advice but instead obtained research assistance, the results of which I have made available to the parties.

The conclusion which I have reached is this: The witness did indeed find himself in a client/counsel relationship with Mr. Creswell, and that therefore their conversation is covered by the rules of privilege. On the other hand, the facts which were in Mr. Alexander's possession are in themselves not privileged and therefore accessible to inquiry.

Since Mr. Alexander has already given testimony with regard to the matters before this board I deem an inquiry into the facts revealed during his conversations with counsel to be of little or no probative value, and will therefore not admit testimony thereon.

Commission counsel may recall the witness to further probe his knowledge in other matters. It may also ask whether in fact he had conversations with Mr. Creswell, but may not inquire into the content of these conversations themselves.

2. The Commission asked that I issue a ban on the publication of the name of witness X., something requested by the witness herself. Respondent counsel objected, holding that such a ban would run counter to the openness of the proceedings as desired by the law.

Ms. X.'s request was not mentioned when she was called upon to give testimony. At the end of the testimony I asked her whether she desired a ban on the publication of her name and she answered in the affirmative, because of her present employment in another company.

October 16, 1992.

APPENDIX K

IN THE MATTER OF JAN WATERMAN AND THE ONTARIO HUMAN RIGHTS COMMISSION V. THE NATIONAL LIFE ASSURANCE COMPANY OF CANADA, ROSS JOHNSON AND VINCE TONNA, AND PURSUANT TO MS. WATERMAN'S COMPLAINT BASED ON THE *ONTARIO HUMAN RIGHTS CODE*, 1981, ch.53, AS AMENDED.

Commission counsel had moved to ban the publication of a certain witness's name as well as details of her testimony, which was of a personal nature and likely to impact on her present situation. The witness (at this point of the proceeding, unnamed) had made this request. Case law cited was *B v. Action Restaurant; Jane Carere v. Family and Children's Services of Guelph and Wellington County.* (See APPENDIX J.)

Respondent counsel opposed the motion, arguing essentially that making such a ruling at this time would wrap the testimony in the mantle of anonymity and by that very fact make the witness less accountable for her testimony.

The board reserved judgement in the matter until the witness was called, and further, that if the witness's name was mentioned during the proceedings, the ruling would deal with the issue at the time. While the public nature of these Hearings was essential, there were exceptions, and the *Statutory Powers Procedures Act* [s. 15(1) and 9(1)] gives boards large leeway to control their proceedings, including ordering in camera hearings. (See Transcript, vol. II:42-65)

When Ms. X. was called later on, she was <u>not</u>, at the outset of her testimony, assured of anonymity. However, when she was being excused she was asked by the chair whether she desired anonymity. She answered affirmatively and gave the reason therefor. The Board indicated that a ruling in the matter would be made later on. (See Transcript vol. VI:101).

Since her testimony was in fact given, without any assurance of privacy attached thereto at the time, I do not feel that there is any reason to impose potential difficulties on the witness. She appeared under summons, and this board feels that her testimony having been rendered, there is every reason to accede to her request. Therefore, under the authority granted by this board by *SPPA* 9(1)(b), a ban is ordered on the publication of the witness's name.

October 20, 1992

APPENDIX L

IN THE MATTER OF JAN WATERMAN AND THE ONTARIO HUMAN RIGHTS COMMISSION V. THE NATIONAL LIFE ASSURANCE COMPANY OF CANADA, ROSS JOHNSON AND VINCE TONNA, AND PURSUANT TO MS. WATERMAN'S COMPLAINT BASED ON THE *ONTARIO HUMAN RIGHTS CODE*, 1981, ch.53, AS AMENDED.

Regarding the testimony of the investigating officer, Wayne McCullough, I issue the following ruling:

> I will admit Mr. McCullough's evidence with regard to the matter stated [Mr. Johnson's attitude and views], restricted to that and the context in which he stated it. I am led to this decision in part because number 16 of the Complaint form does state that,
>
> > "...The Director of Administration acknowledged a problem that Ross Johnson [the president of the company] had a problem with my homosexuality, but she thought he had overcome it..."

The attitude of the president of NLA formed part of the complaint, and Mr. McCullough's testimony may throw light on it. Therefore, he may be called to testify with regard to his conversation with Mr. Johnson.
(Transcript vol. IX:16-17.)

November 2, 1992

END OF APPENDICES